TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914. 1915

No. [redacted] 242

F. S. PITNEY, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED SEPTEMBER 8,. 1914

(24,362)

(24,362)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 618.

F. S. PITNEY, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1914.

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Filed Jul- 10, 1914. C. S. Reinhart, Clerk, F. S. G.

No. 6596.

STATE OF WASHINGTON, Plaintiff-Respondent,
vs.
F. S. PITNEY, Defendant-Appellant.

Transcript on Appeal from the Superior Court of the State of Washington for the County of King, to the Supreme Court of the State of Washington.

Filed in Clerk's Office Jul- 9, 1914. W. K. Sickles, Clerk, by O. S. Bruns, Deputy.

3 In the Superior Court of the State of Washington for King County.

No. 6596.

STATE OF WASHINGTON, Plaintiff,
vs.
F. S. PITNEY, Defendant.

Information.

I, John F. Murphy, Prosecuting Attorney in and for the County of King, State of Washington, come now here in the name of and by the authority of the state of Washington, and by this information do accuse F. S. Pitney of the crime of using and furnishing stamps coupons and certificates for and with the sale of goods, wares and merchandise without a license, committed as follows, to wit:

The United Cigar Stores Company, Inc., in the County of King, State of Washington, on the 16th day of June, 1913, being then and there a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and doing business in the State of Washington, did then and there own and conduct a certain store and place of business located at No. 803 Second Avenue, in the City of Seattle, and had not then, nor theretofore, obtained a separate license from the auditor of the said county of King, for the said store and place of business, as provided by law, entitling and authorizing the said corporation, at the said store and place of business, to use, or furnish to other persons, firms, or corporations to use, in, with, or for the sale of any goods, wares or merchandise any stamps, coupons, tickets, certificates, cards, or other similar devices, entitling the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any

person, firm, or corporation, any goods, wares or merchandise, free of charge or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets,
4 certificates, cards, or other similar devices, and

He, said F. S. Pitney, in the said County of King, State of Washington, at the said store and place of business at the said No. 803 Second Avenue in the said City of Seattle, well knowing the aforesaid things to be true, did then and there wilfully and unlawfully, as the manager, servant and agent of and on behalf of the said United Cigar Stores Company, Inc., use and furnish, in, with, in connection with, and for the sale of certain goods, wares and merchandise, to one John Garvin, a certain stamp, coupon, ticket, certificate, card and device of the following tenor and effect, to wit:

No. 139,198. Dr.

United Cigar Stores Company (Incorporated).

Certificate.

Cash value at any Profit Sharing Station in the State of Washington, 1 cent, but average merchandise value, according to profit sharing list, 2 cents.

This certificate represents a twenty-five cent purchase and is redeemable according to the conditions of our profit sharing list. Ask for copy of list. Redeemable only by the person to whom originally issued.

UNITED CIGAR STORES
COMPANY (INCORPORATED).

Largest Cigar Retailers in the world.

Contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington.

JOHN F. MURPHY,
Prosecuting Attorney.

5 STATE OF WASHINGTON,
County of King, ss:

Thomas J. L. Kennedy, being first duly sworn, on oath says that he is a deputy prosecuting attorney in and for the County of King, State of Washington; that he has read the foregoing information, knows the contents thereof, and believes the same to be true.

THOMAS J. L. KENNEDY.

Subscribed and sworn to before me this 17th day of June, 1913.

[SEAL.]

W. K. SICKELS,
Clerk of the Superior Court of King County,
State of Washington.
By G. A. GRANT, *Deputy.*

Witnesses for the State: John Garvin, Will H. Hanna, Byron Phelps.

Filed in Clerk's Office Jun- 17, 1913. W. K. Sickels, Clerk, by G. A. Grant, Deputy.

6 In the Superior Court of the State of Washington, County of King.

No. 6596.

STATE OF WASHINGTON, Plaintiff,
vs.
F. S. PITNEY, Defendant.

Hon. J. T. Ronald, Judge.

WEDNESDAY, June 18, 1913.

Now, at this time, come into open Court the State of Washington, by Edgar J. Wright, Deputy Prosecuting Attorney, and the defendant, appearing in person in the custody of the Sheriff.

Defendant is brought before the Court, and an information having been heretofore duly filed in this case and the defendant being interrogated if the name by which he is informed against is his true name, answer makes that it is, and the defendant is now duly arraigned by Edgar J. Wright, Deputy Prosecuting Attorney before the Court and under its direction, by reading to the defendant the information filed in this cause and delivering to said defendant a certified copy thereof and all endorsements thereon.

The defendant is asked if he is ready to plead to the information so read to him, to which he answer makes that he is not, whereupon the Court grants 10 days in which to plead to said information.

Bail Bond is approved.

Jour. 409.

Page 429.

7 In the Superior Court of the State of Washington for King County.

No. 6596.

STATE OF WASHINGTON, Plaintiff,
vs.
F. S. PITNEY, Defendant.

Bail Bond.

STATE OF WASHINGTON,
County of King, ss:

Know all men by these presents:

That we, F. S. Pitney, as principal, and New England Casualty Company, a body corporate organized and existing under the laws

of the State of Massachusetts and authorized to transact the business of surety in the state of Washington, as surety, are held and firmly bound unto the State of Washington in the penal sum of Five Hundred Dollars ($500.00), for the payment of which sum, well and truly to be made, we bind ourselves and each of us, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 18th day of June, A. D. 1913.

The condition of the foregoing obligation is such that

Whereas, the above named principal stands charged by information presented in the Superior Court of the State of Washington for King County with the offence of using and furnishing stamps, coupons and certificates for and with the sale of goods, wares and merchandise without a license;

Now, therefore, the condition of the foregoing obligation is such that, if the said F. S. Pitney shall well and truly appear in the above entitled court whenever his presence shall be required,
8 and in all things yield obedience to the orders and judgment of said court, then this obligation shall be null and void; otherwise to remain in full force and effect.

F. S. PITNEY, *Principal.* [SEAL.]
NEW ENGLAND CASUALTY COMPANY.
By C. M. SEELEY, *Attorney in Fact.*
SEELEY & CO.,
By N. BURSCHER, [CORPORATE SEAL.]
General Agent.

Approved 6/18/13.
J. T. RONALD, *Judge.*

Filed in Clerk's Office Jun- 18, 1913. W. K. Sickels, Clerk, by G. A. Grant, Deputy.

9 In the Superior Court of the State of Washington for the County of King.

STATE OF WASHINGTON,
King County, ss:

Warrant.

The State of Washington to the Sheriff of King County, Greeting:

Whereas, an Information has been filed in the above entitled Court, charging F. S. Pitney with the crime of using & furnishing stamps, etc., without a license.

You are therefore commanded to forthwith arrest the said F. S. Pitney and keep him in custody until he is discharged according to law, and make due return of this writ with your manner of service endorsed thereon.

Witness my hand and Seal this 17th day of June, A. D. 1913.

[SEAL.]

W. K. SICKLES,
Clerk Superior Court,
By G. A. GRANT,
Deputy Clerk.

STATE OF WASHINGTON,
King County, ss:

Received the within Warrant June 18th, 1913.

Executed the same June 18th, 1913, by arresting the within named, who was released on Bond F. S. Pitney and —— ——.

EDWARD CUDIHEE,
Sheriff of King County, Washington.
By A. D. FOSTER, *Deputy.*

Sheriff's Fees:

Service.....	2.00
Mileage.....	.20
Keeping.....	
Total.....	2.20

Filed in Clerk's Office Jun- 19, 1913. W. K. Sickels, Clerk, by F. W. Smith, Deputy.

10 In the Superior Court of the State of Washington in and for King County.

No. 6596.

STATE OF WASHINGTON, Plaintiff,
vs.
F. S. PITNEY, Defendant.

Demurrer.

Comes now the defendant and demurs to the information herein for the following reasons:

I.

That it appears upon the face of the information that defendant has not violated any law.

II.

That said information fails to state facts sufficient to constitute a crime or misdemeanor.

III.

That said information does not charge any offense against the laws of the State of Washington.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant.

Copy of within Demurrer received and due service of same acknowledged this 27th day of June, 1913.

JOHN F. MURPHY,
Attorney for Plaintiff.

Filed in Clerk's Office Jun- 27. 1913. W. K. Sickels, Clerk, by G. A. Grant, Deputy.

11 In the Superior Court of the State of Washington for King County.

No. 6596.

STATE OF WASHINGTON, Plaintiff,
vs.
F. S. PITNEY, Defendant.

Amended Information.

I, John F. Murphy, Prosecuting Attorney in and for the County of King, State of Washington, come now here in the name of and by the authority of the State of Washington, and by this amended information do accuse F. S. Pitney of the crime of using and furnishing stamps coupons and certificates for and with the sale of goods wares and merchandise without a license, committed as follows, to wit:

The United Cigar Stores Company, Inc., in the County of King, State of Washington, on the 16th day of June, 1913, being then and there a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and doing business in the State of Washington, did then and there own and conduct a certain store and place of business located at No. 803 Second Avenue, in the city of Seattle, and had not then, nor theretofore, obtained a separate license from the auditor of the said county of King, for the said store and place of business, as provided by law, entitling and authorizing the said corporation, at the said store and place of business, to use, or furnish to other persons, firms or corporations to use, in, with, or for the sale of any goods, wares or merchandise any stamps, coupons, tickets, certificates, cards, or other similar devices, entitling the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm, or corporation, any goods, wares or merchandise, free of charge

12 or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, and

He, said F. S. Pitney, in the said County of King, State of Washington, at the said store and place of business at the said No. 803 Second Avenue in the said City of Seattle, well knowing the aforesaid things to be true, did then and there wilfully and unlawfully, as the manager, servant and agent of and on behalf of the said United Cigar Stores Company, Inc., use and furnish, in, with, in

connection with, and for the sale of certain goods, wares and merchandise, to one John Garvin, a certain stamp, coupon, ticket, certificate, card and device, which did then and there entitle the said John Garvin, who then and there received said stamp, coupon, ticket, certificate, card and device with such sale of goods, wares and merchandise, to procure from said United Cigar Stores Company, Inc., upon the production of certain specified numbers of said stamps, coupons, tickets, certificates, cards, or other similar devices, certain goods, wares or merchandise, free of charge, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington.

JOHN F. MURPHY,
Prosecuting Attorney.

13 STATE OF WASHINGTON,
County of King, ss:

Robert Evans, being first duly sworn on oath deposes and says: That he is a deupty prosecuting attorney in and for the County of King, State of Washington; that he has read the foregoing amended information, knows the contents thereof and believes the same to be true.

ROBERT H. EVANS.

Subscribed and sworn to before me this 29th day of July, 1913.
[SEAL.] W. K. SICKELS,
Clerk of the Superior Court of King County, State of Washington.
By F. W. SMITH, *Deputy.*

Witnesses for the State: John Garvin, Will H. Hanna, Byron Phelps.

Filed in Clerk's Office Jul. 30, 1913. W. K. Sickels, Clerk, by F. W. Smith, Deputy.

14 In the Superior Court of the State of Washington, County of King.

No. 6596.

STATE OF WASHINGTON, Plaintiff,
vs.
F. S. PITNEY, Defendant.

Hon. J. T. Ronald, Judge.

TUESDAY, July 29, 1913.

Demurrer to amended information sustained and exception allowed.
Cause is dismissed and exception allowed.

In open Court State gives notice of appeal to the Supreme Court of the State of Washington.
Jour. 409.
Page 542.

15 *Assignment of Errors on Appeal from the Superior Court, Numbered I and II, Contained in the Opening Brief of Appellant and Filed in Said Cause on Appeal in the Supreme Court and Found on Pages 6 and 7 of Said Brief.*

I.

The court erred in sustaining said demurrer.

II.

The court erred in dismissing said action.

16 En Banc.

11565.

THE STATE OF WASHINGTON, Appellant,
vs.
F. S. PITNEY, Respondent.

May 16, 1914.

The defendant in this case was by information charged with the crime of using trading stamps, in violation of law. At the legislative session of 1913, Laws of 1913, p. 413, an act was passed forbidding the use in connection with the sale of goods, wares or merchandise, of any stamps, coupons, tickets, certificates, cards, or other similar devices, unless a license fee in the sum of $6,000 per annum be paid, as specified in the act. A violation of any of the provisions of the act was made a gross misdemeanor. To the amended information charging the defendant with the use of trading stamps in violation of the statute, a demurrer was interposed. This was sustained by the trial court. The State elected to stand upon the amended information and refused to plead further. Thereupon a judgment dismissing the cause was entered, from which the present appeal is prosecuted.

The sole question for determination is, whether the act in question violates any provision of the state or federal constitutions. As sustaining the judgment of the trial court, our attention is called to the following provisions of the state constitution: Art. 1, Par. 3, which provides, that no person shall be deprived of life, liberty, or property without due process of law; section 12, of the same article, which guarantees the equal protection to all citizens; and Par. 14, which prohibits excessive fines. The provision of the Federal constitution which is pointed out is Par. 1 of the 14th amendment, which provides that no state shall deprive any person of life, liberty, or prop-

erty, without due process of law, nor deny to any person
17 within its jurisdiction the equal protection of the laws.

That provision of the state constitution which prohibits excessive fines need not be further noticed. For the purposes of this opinion, it will be assumed that the fine of $6,000 which the act provides for is prohibitory. In other words, the act will be considered as though it prohibited the use of trading stamps. This assumption also makes it unnecessary to determine whether the court may inquire into the amount of the tax, when the right to tax is once established, and determine whether it is prohibitive. The provisions of the Federal and the state constitutions relative to the equal protection of the laws and due process of law are substantially the same. That the law does not violate the rights of a citizen to equal protection of the laws is settled in the cases of Fleetwood v. Read, 21 Wash., 547; Sperry & Hutchinson Co. v. Tacoma, 68 Wash. 254.

The ultimate question for determination is whether a law which prohibits the use of trading stamps violates the due process of law clause of either the state or Federal constitutions. When the constitutionality of a legislative enactment is called in question, it will be presumed constitutional and valid until the contrary clearly appears. It is the duty of the court to sustain the law, unless invalidity is so apparent as to leave no reasonable doubt upon the question. In State v. Ide, 35 Wash. 576, the court speaking upon this subject said:

"Before proceeding to the consideration of the objections interposed by appellant to this poll tax law and these city ordinances, we deem it proper to observe that it is settled by the highest authority that a legislative enactment is presumed to be constitutional and valid until the contrary clearly appears. In other words, the courts will presume that an act regularly passed by the legislative body of the government is a valid law, and will entertain no presumptions against its validity. And, when the constitutionality of an
18 act of the legislature is drawn in question, the court will not declare it void unless its invalidity is so apparent as to leave no reasonable doubt upon the subject."

If the law under consideration is a proper exercise of the police power, its constitutionality will hardly be denied. In determining the validity of the law, therefore, inquiry must be directed to whether its provisions come within the scope of the police power. The early decisions define this power as extending to those regulations promulgated by or under the authority of the legislature which had for their object the promotion of the public health, the public morals, or the public safety. Without reviewing the evolution of the law upon this subject, as evidenced by the decisions of courts of last resort, it may be said that, whatever may be the limits by which the earlier decisions circumscribed the power, it has, in the more recent decisions, been defined to include all those regulations designed to promote the public convenience, the general welfare, the general prosperity, and extends to all great public needs, as well as regulations designed to promote the public health, the public morals, or

the public safety. In Chicago, B. & Q. R. Co. v. People of Illinois ex rel. Drainage Com'rs, 200 U. S. 561, it was said:

"We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

In Noble State Bank v. Haskell, 219 U. S. 104, it was said:

"It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518. 42 L. ed. 260—17 Supr. Ct. Ref. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In Schmidinger v. Chicago, 226 U. S. 578, it was said:

19 "The right of state legislatures or municipalities acting under state authority, to regulate trades and callings in the exercise of the police power is too well settled to require any extended discussion. In Gundling v. Chicago, 177 U. S. 183, the doctrine was stated by this court as follows (p. 188):

" 'Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference.' "

This court, in State v. Mountain Timber Co., 75 Wash. 581, discussing the scope of the police power, used this language:

"The scope of the police power is to be measured by the legislative will of the people upon questions of public concern, not in acts passed in response to sporadic impulses or exuberant displays of emotion, but in those enacted in affirmance of established usage or of such standards of morality and expediency as have by gradual processes and accepted reason become so fixed as to fairly indicate the better will of the people in their social, industrial and political development. If, then, the executive and judicial departments unite to uphold the will of the legislative department, it may fairly be said that all reasonable men can agree that the act is essential for the preservation of the public welfare and that the constitution does not apply."

20 In determining whether the provisions of a law bring it within the police power, it is not necessary for the court to find that facts exist which would justify such legislation. If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist

to justify the statute, then it may be declared void because in excess of the legislative power. In Munn v. Illinois, 94 U. S. 113, speaking upon this question, it was said:

"For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

In Home Telephone etc. Co. v. Los Angeles, 211 U. S. 265, a like view is expressed. It is there said, quoting from a previous decision of the same court:

"But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well settled rule of constitutional exposition that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."

21 It follows, then, that if a state of facts could exist which would justify the legislature in forbidding the use of trading stamps, it must be presumed to have actually existed. What state of facts might reasonable have promited the legislature to forbid the use of trading stamps in connection with the sale of merchandise. It might reasonably be supposed or presumed that the legislature believed that the use of these stamps would encourage indiscriminate and unnecessary purchasing by people ill able to indulge in any extravagance. Or suppose that the legislature believed that the use of these stamps was practically forced upon certain merchants without any practical benefit resulting therefrom, and thus they were compelled to pay 3½% upon their gross sales for the use of the stamps. The legislature might reasonably have believed that the stamp companies, in order to cause the stamps to be used in a certain city, would contract with one merchant for their use, agreeing to pay him a percentage of the sums collected by them from other merchants, and then use the first contract so secured to force other merchants into using the stamps, or suffer loss of trade by failure so to do. In other words, that legitimate business was virtually coerced into paying tribute to the stamp company, a non-producer of wealth or value.

In the case of Otis v. Parker, 187 U. S. 606, the question before the court was whether a provision of the California constitution which prohibited the sale of the shares of capital stock of any corporation on margin, to be delivered at a future date, offended against the due process of law clause of the Federal constitution. It was held that

the regulation provided for in the state constitution did not exceed the power of the state. It was said:

"We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that
22 there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion."

In the case of Central Lumber Co. v. South Dakota, 226 U. S. 157, there was under consideration an act of the legislature of South Dakota, which prohibited a person in the production, manufacture and distribution of any commodity in general use from discriminating between different sections or communities or cities of the State by selling such a commodity at a lower rate in one section than in another. The constitutionality of the law was sustained. In the course of the opinion it was said:

"We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction appears from the decisions in other states (citing authorities)."

The facts hypothetically stated, as well as others that might be presumed to have existed, would seem to bring the present case within the holdings of the two cases last cited. That the law was not passed in response to "sporadic impulse or exuberant display of emotion," but embodies a settled conviction that the use of trading stamps is harmful, is evidenced by the fact that the legislature at two
23 different sessions has legislated against their use, first in 1905 (Laws of 1905, p. 374) and second, in 1913, the present law. We think this act of the legislature falls within the scope of the police power as it is now understood and defined by the courts, and, therefore, the legislature did not exceed its power or offend against any constitutional provision, either state or federal, in promulgating the regulations or prohibitions found in the act. This conclusion, it must be admitted, is not in harmony with the great weight of authority, numerically speaking. But many, if not most, of the decisions that have held trading stamp laws inimical to the due process of law clause found in the constitutions were decided when the police power was defined as having a more limited scope than it has at the present time.

In considering the law of 1905 prohibiting the use of trading stamps, this court, in Leonard v. Bassindale, 46 Wash. 301, held that law unconstitutional. The holding in that case is the exact oppo-

site of the conclusion we have reached in that case. That decision will therefore be overruled. The opinion in that case contains a suggestion that the court there concluded to follow the weight of authority, even though it would have been inclined, were the question one of first impression, to sustain the law. It was there said:

"While we might, were the question one of first impression in the courts, entertain a different opinion, we have felt impelled to follow the great weight of authority and hold the statute constitutional, especially in view of the fact that the Federal courts have shown an inclination to hold the statute in contravention of the constitution of the United States."

As already stated, the due process of law clauses in the
24 state and Federal constitutions are substantially the same.

While a number of the subordinate Federal courts have held that a trading stamp law contravenes the due process of law clause in the Federal constitution, the United States Supreme Court, so far as we are informed, has never spoken upon that question. The result of this case will offer an opportunity to have the question there presented and finally determined by the court of highest authority.

The judgment will be reversed, and the cause remanded with directions to the superior court to overrule the demurrer.

MAIN, *J.*

We concur:
CROW, *C. J.*,
CHADWICK,
FULLERTON,
PARKER, AND
MORRIS, *JJ.*, concur.

Mount and Gose, JJ., dissent.

STATE OF WASHINGTON,
County of Thurston, ss:

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct copy of the opinion of the court as the same was filed on the 16th day of May, 1914, and now remains of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court, this 29th day of May, 1914.

[SEAL.] C. S. REINHART, *Clerk.*

25 In the Supreme Court of the State of Washington, May Session, A. D. 1914.

Be it remembered, That at a regular session of the Supreme Court of the State of Washington begun and holden at Olympia on the second Monday of May, A. D. 1914, it being the Eleventh day of said month, among other, the following was had and done, to-wit:

No. 11565.

STATE OF WASHINGTON, Appellant,
vs.
F. S. PITNEY, Respondent.

Judgment.

THURSDAY, May 28th, 1914.

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 28th day of May, A. D. 1914, on motion of John F. Murphy, Esquire, of counsel for appellant, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby reversed and remanded with directions to overrule the demurrer, and that the said State of Washington have and recover of and from the said F. S. Pitney the costs of this action taxed and allowed at One Hundred & Eighty-Nine & 00/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is — true
26 copy of the Judgment and Decree in said cause, as the same now remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 28th day of May, A. D. 1914.

[SEAL.] C. S. REINHART,
Clerk of the Supreme Court, State of Washington.

Filed in Clerk's Office Jun- 1, 1914. W. K. Sickels, Clerk, By F. W. Smith, Deputy.

27 In the Superior Court of the State of Washington in and for King County.

No. 6596.

STATE OF WASHINGTON, Plaintiff,
vs.
F. S. PITNEY, Defendant.

Order Overruling Demurrer.

Now on motion of John F. Murphy, Prosecuting Attorney of King County, State of Washington, and in obedience to the mandate of the Supreme Court of the State of Washington heretofore

filed herein, it is ordered that the demurrer of the defendant herein be and the same is hereby overruled.

Done in open Court this 8th day of July, 1914.

J. T. RONALD, *Judge.*

Filed in Clerk's Office Jul- 8, 1914. W. K. Sickels, Clerk, By F. W. Smith, Deputy.

28 In the Superior Court of the State of Washington in and for King County.

No. 6596.

STATE OF WASHINGTON, Plaintiff,
vs.
F. S. PITNEY, Defendant.

Motion in Arrest of Judgment.

On this 8th day of July, 1914, the said defendant having been adjudged guilty of the crime of using in, with and for the sale of goods, wares and merchandise, stamps, coupons, tickets, certificates, cards and devices, entitling the purchaser receiving the same with such sale of goods, wares or merchandise to procure merchandise free of charge or for less than the retail market price thereof, without he or the corporation in whose employ he was at said time having first obtained a license therefor, as provided by Chapter 134 of the Laws of 1913 of the State of Washington, now, before the imposition of sentence, the said defendant moves that said judgment may be arrested and he be discharged, for the reason that the facts stated in the information are not sufficient to constitute a crime or misdemeanor, for the reason that the statute of the State of Washington upon which said information is based, to-wit, Chapter 134 of the Session Laws of 1913 of said State of Washington, is violative of Article 5 of the Constitution of the United States, which provides that no person can be deprived of life, liberty or property without due process of law; and for the further reason that said statute is violative of Article 8 of the Constitution of the United States which provides that excessive fines shall not be imposed or cruel or unusual punishments inflicted; and the said statute
29 is violative of Section 1 of Article 14 of the Constitution of the United States which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no State shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

HUGHES, McMICKEN, DOVELL & RAMSEY.
Attorneys for Defendant.

Filed in Clerk's Office Jul- 8, 1914. W. K. Sickels, Clerk, By F. W. Smith, Deputy.

30 In the Superior Court of the State of Washington in and for King County.

No. 6596.

STATE OF WASHINGTON, Plaintiff,
v.
F. S. PITNEY, Defendant.

Judgment.

On this 8th day of July, 1914, came on to be heard the above entitled cause, and thereupon the defendant, having been duly arraigned, pleads guilty; and thereupon it is ordered that the said plea be and the same is hereby entered.

Thereupon it was by stipulation of the parties hereto made to appear that the said F. S. Pitney did on the 16th day of June, 1913, in the said county of King, at the store of the United Cigar Stores Company, Inc., therein and while the said F. S. Pitney was acting as the agent and employe of the United Cigar Stores Company, Inc., and not otherwise, and when the said United Cigar Stores Company, Inc. or the said F. S. Pitney had not then nor theretofore obtained a separate license from the Auditor of said County of King for the said store and place of business, as provided by law, entitling and authorizing the said corporation at the said store and place of business to use or furnish to other persons, firms or corporations to use in, with or for the sale of any goods, wares or merchandise any stamps, coupons, tickets, certificates, cards or other similar devices, entitling the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm or corporation any goods, wares or merchandise free of charge or for less than the retail market price thereof upon the production of
31 any number of said stamps, coupons, tickets, certificates, cards or other similar devices, he, the said F. S. Pitney, well knowing the aforesaid things to be true, as the manager, servant and agent of and on behalf of the United Cigar Stores Company, Inc., did use and furnish in, with, in connection with and for the sale of certain goods, wares and merchandise to one John Garvin a certain stamp, coupon, ticket, certificate, card and device, which did then and there entitle the said John Garvin, who then and there received said stamp, coupon, ticket, certificate, card or device with such sale of goods, wares and merchandise, to procure from said United Cigar Stores Company, Inc., upon the production of certain specified numbers of said stamps, coupons, tickets, certificates, cards or other similar device, certain goods, wares or merchandise free of charge. That said stamp, coupon, ticket, certificates, card or device so delivered to the said John Garvin and so received by him as aforesaid was redeemable by the said United Cigar Stores Company, Inc. alone and entitled said John Garvin to receive from the said United Cigar Stores Company, Inc. and from no other, by the production of certain specified numbers of said stamps, coupons, tickets, cer-

tificates, cards, or other similar devices, certain goods, wares or merchandise free of charge. The said Stamp, coupon, ticket, certificate, card or device was by its terms made redeemable in goods, wares, or merchandise as aforesaid or one cent in cash, at the option of the holder as provided by the laws of the state of Washington.

And thereupon upon said plea of guilty, it is considered, ordered and adjudged, that the said F. S. Pitney is guilty of the offense charged in said information.

And thereafter the said defendant filed a motion in arrest of judgment, for the reason that the facts stated in the information do not constitute a crime or misdemeanor; thereupon, after due consideration, it is ordered that said motion be and the same is hereby overruled; to the overruling of which motion said defendant at said time duly excepted.

32 Now, therefore, in consideration of the premises, it is adjudged that the said defendant, F. S. Pitney, do pay a fine of $ten, together with the costs of this action, and that he be imprisoned in the county jail of King County until said fine and costs are paid.

Thereupon the said defendant, by his counsel, did on this day give notice of appeal from said judgment and sentence to the Supreme Court of the State of Washington.

J. T. RONALD, *Judge.*

Filed in Clerk's Office Jul- 8, 1914. W. K. Sickles, Clerk, by F. W. Smith, Deputy.

33 In the Superior Court of the State of Washington for the County of King.

No. 6596.

STATE OF WASHINGTON, Plaintiff,
vs.
F. S. PITNEY, Defendant.

STATE OF WASHINGTON,
County of King, ss:

I, W. K. Sickels, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington for the County of King, do hereby certify that the foregoing is a full, true and correct transcript of so much of the files and record in the above entitled cause as I have been directed by Appellant to transmit to the Supreme Court of the State of Washington as a Transcript on Appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Superior Court at my office, this 9th day of July, A. D. 1914.

[Seal Superior Court.]

W. K. SICKELS,
County Clerk,
By O. S. BRUNS,
Deputy Clerk.

34 In the Supreme Court of the State of Washington.

12157.

STATE OF WASHINGTON, Respondent,
vs.
F. S. PITNEY, Appellant.

No. —.

Filed Jul- 10, 1914. C. S. Reinhart, Clerk, F. S. G.

Appellant's Abstract of Record.

Appeal from the Judgment of the Superior Court of the State of Washington for King County.

Stroock & Strook, Hughes, McMicken, Dovell & Ramsey, 661-670 Colman Building, Seattle, Washington, Attorneys for Appellant.
John F. Murphy, Prosecuting Attorney; Robert H. Evans, Deputy; Brightman, Halverstadt & Tennant, Alaska Building, Seattle, Washington, Attorneys for Respondent.

35 *Index.*

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36 In the Supreme Court of the State of Washington.

No. —.

STATE OF WASHINGTON, Respondent,
vs.
F. S. PITNEY, Appellant.

On May 16, 1914, the above entitled court filed an opinion in Cause No. 11565, entitled "State of Washington, Appellant, vs. F. S. Pitney, Respondent," directing the Superior Court of the State of Washington for King County to overrule the demurrer interposed by the defendant in Cause No. 6569 in said Superior Court.

Upon the filing of the remittitur, the following order was singed and filed on the 8th day of July, 1914:

Order Overruling Demurrer.

Now on motion of John F. Murphy, Prosecuting Attorney of King County, State of Washington, and in obedience to the mandate of

the Supreme Court of the State of Washington heretofore filed herein, it is ordered that the demurrer of the defendant herein be and the same is hereby overruled.

Judgment.

Thereupon the following judgment was entered in said cause:

37 On this 8th day of July, 1914, came on to be heard the above entitled cause, and thereupon the defendant, having been duly arraigned, pleads guilty; and thereupon it is ordered that the said plea be and the same is hereby entered.

Thereupon it was by stipulation of the parties hereto made to appear that the said F. S. Pitney did on the 16th day of June, 1913, in the said county of King, at the store of the United Cigar Stores Company, Inc. therein and while the said F. S. Pitney was acting as the agent and employe of the United Cigar Stores Company, Inc., and not otherwise, and when the said United Cigar Stores Company, Inc. or the said F. S. Pitney had not then nor theretofore obtained a separate license from the Auditor of said County of King for the said store and place of business, as provided by law, entitling and authorizing the said corporation at the said store and place of business to use or furnish to other persons firms or corporations to use in, with or for the sale of any goods, wares or merchandise any stamps, coupons, tickets, certificates, cards or other similar devices, entitling the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm or corporation any goods, wares or merchandise free of charge or for less than the retail market price thereof upon the production of any number of said stamps, coupons, tickets, certificates, cards or other similar devices, he, the said F. S. Pitney, well knowing the aforesaid things to be true, as the manager, servant and agent of and on behalf of the United Cigar Stores Company, Inc., did use and furnish in, with, in connection with and for the sale of certain goods, wares and mer-

38 chandise to one John Garvin a certain stamp, coupon, ticket, certificate, card and device, which did then and there entitle the said John Garvin, who then and there received said stamp, coupon, ticket, certificate, card or device with such sale of goods, wares and merchandise, to procure from said United Cigar Stores Company, Inc., upon the production of certain specified numbers of said stamps, coupons, tickets, certificates, cards or other similar vice, certain goods, wares or merchandise free of charge. That said stamp, coupon, ticket, certificate, card or device so delivered to the said John Garvin and so received by him as aforesaid was redeemable by the said United Cigar Stores Company, Inc. alone and entitled said John Garvin to receive from the said United Cigar Stores Company, Inc. and from no other, by the production of certain specified numbers of said stamps, coupons, tickets, certificates, cards or other similar device, certain goods, wares or merchandise free of charge. The said stamp, coupon, ticket, certificate, card or device was by its

terms made redeemable in goods, wares or merchandise, as aforesaid, or in cash at the option of the holder, as provided by the laws of the State of Washington.

And thereupon upon said plea of guilty, it is considered, ordered and adjudged, that the said F. S. Pitney is guilty of the offense charged in said information.

And thereafter the said defendant filed a motion in arrest of judgment, for the reason that the facts stated in the information do not constitute a crime or misdemeanor; thereupon, after due consideration, it is ordered that said motion be and the same is hereby overruled; to the overruling of which motion said defendant at said time duly excepted.

39 Now, therefore, in consideration of the premises, it is adjudged that the said defendant, F. S. Pitney, do pay a fine of $10.00, together with the costs of this action, and that he be imprisoned in the county jail of King County until said fine and costs are paid.

Thereupon the said defendant, by his counsel did on this day give notice of appeal from said judgment and sentence to the Supreme Court of the State of Washington.

(Signed) J. T. RONALD, *Judge.*

On the same date, to wit, July 8, 1914, the defendant filed a motion in arrest of judgment, as follows:

On this 8th day of July, 1914, the said defendant having been adjudged guilty of the crime of using in, with and for the sale of goods, wares and merchandise, stamps, coupons, tickets, certificates, cards and devices, entitling the purchaser receiving the same with such sale of goods, wares and merchandise to procure merchandise free of charge or for less than the retail market price thereof, without he or the corporation in whose employ he was at said time having first obtained a license therefor, as provided by chapter 134 of the Laws of 1913 of the State of Washington, now before the imposition of sentence, the said defendant moves that said judgment may be arrested and he be discharged, for the reason that the facts stated in the information are not sufficient to constitute a crime or misdemeanor, for the reason that the statute of the State of Washington upon which said information is based, to wit: Chapter 134 of the Session Laws of 1913 of said State of Washington, is violative of Article 5 of

40 the Constitution of the United States, which provides that no person can be deprived of life, liberty or property without due process of law; and for the further reason that said statute is violative of article 8 of the constitution of the United States which provides that excessive fines shall not be imposed or cruel or unusual punishments inflicted; and the said statute is violative of section 1 of article 14 of the constitution of the United States which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Appeal.

On the 8th day of July, 1914, the defendant, in open court, appealed from the judgment of the court.

The transcript on appeal was prepared and filed in the office of the clerk of the superior court on the 9th day of July, 1914.

41 In the Supreme Court of the State of Washington.

12157.

Filed Jul- 10, 1914. C. S. Reinhart, Clerk F. S. G.

No. —.

STATE OF WASHINGTON, Respondent,
vs.
F. S. PITNEY, Appellant.

Stipulation.

It is stipulated, by and between the parties hereto, that said cause may be forthwith docketed and the same submitted to the court without argument.

Dated July 8, 1914.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Appellant.
JOHN F. MURPHY,
Prosecuting Att'y.
BRIGHTMAN, HALVERSTADT & TENNANT,
Attorneys for Respondent.

42 In the Supreme Court of the State of Washington.

12157.

Filed Jul- 10, 1914. C. S. Reinhart, Clerk F. S. G.

No. —.

STATE OF WASHINGTON, Respondent,
vs.
F. S. PITNEY, Appellant.

Acceptance of Service.

Respondent herein hereby acknowledges receipt and due service of copy of appellant's abstract of record on appeal this 9th day of July, 1914.

JOHN F. MURPHY,
BRIGHTMAN, HALVERSTADT & TENNANT,
Attorneys for Respondent.

43 Assignment of Errors on Appeal from Superior Court, Numbered I, II, III, Contained in the Opening Brief of Appellant and filed in said Cause on Appeal in the Supreme Court and found on page 2 of said Brief.

I.

The court erred in overruling the demurrer of the defendant.

II.

The court erred in overruling defendant's motion in arrest of judgment.

III.

The court erred in entering judgment and imposing the sentence appealed from.

44 Department One.

No. 12157.

Filed July 14, 1914.

STATE OF WASHINGTON, Respondent,
vs.
F. S. PITNEY, Appellant.

Per Curiam:—

On June 17, 1913, an information was filed in the superior court in and for King county, charging that the defendant had violated Chapter 134 of the laws of 1913 of the State of Washington, commonly known as the "Trading Stamp Act." From an order sustaining defendant's demurrer and dismissing the action the state appealed. Upon consideration of that appeal this court reversed the judgment and remanded the cause to the superior court with directions to overrule the demurrer.

State v. Pitney, 37 Wash. Dec., 451.

After remittitur the demurrer was overruled and the defendant entered a plea of guilty. Thereafter the defendant interposed a motion in arrest of judgment. This motion was denied and sentence was imposed. The defendant has again appealed.

By his assignments the appellant contends that the trial court erred in overruling the demurrer to the information, in overruling his motion in arrest of judgment, and in entering judgment and imposing sentence, for the reason that Chapter 134 Session Laws of 1913, upon which this prosecution is predicated is in violation of sections three, twelve and fourteen of article one of the constitution of the state of Washington, and is also in violation of article five, article eight, and section one of article fourteen of the amendments to the constitution of the United States and is therefore void.

These questions were all determined adversely to appellant's
45 contentions on the former appeal prosecuted by the state.

For the reasons announced in our former opinion in State v. Pitney, supra, the judgment of the trial court is now affirmed.

46 In the Supreme Court of the State of Washington.

No. 12159.

STATE OF WASHINGTON, Respondent,
vs.
F. S. PITNEY, Appellant.

Judgment.

WEDNESDAY, July 22, 1914.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of King county, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now on this 22d day of July, 1914, on motion of John F. Murphy, Esquire, of counsel for respondent, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs; and that the said state of Washington have and recover of and from the said F. S. Pitney the costs of this action taxed and allowed at Nineteen & 50/100 dollars and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

47 In the Supreme Court of the State of Washington.

12157.

Filed July 22, 1914. Fred S. Guyot, Dep. Clerk.

No. —.

STATE OF WASHINGTON, Respondent,
vs.
F. S. PITNEY, Appellant.

Stipulation.

It is stipulated by and between the respective parties hereto, that the remittitur in this cause shall be transmitted forthwith to the Superior Court of King County.

Dated: July 14, 1914.

JOHN F. MURPHY &
BRIGHTMAN, HALVERSTADT &
TENNANT,
Attorneys for Respondent.
HUGHES, McMICKEN, DOVELL &
RAMSEY,
Attorneys for Appellant.

48 In the Supreme Court of the State of Washington.

12157.

Filed Jul- 23, 1914. C. S. Reinhart, Clerk. F. S. G.

No. —.

STATE OF WASHINGTON, Respondent,
vs.
F. S. PITNEY, Appellant.

Petition for Writ of Error.

Comes now F. S. Pitney, appellant, and says:

That on the 14th day of July, 1914, judgment in this cause was entered by this court against the said F. S. Pitney, appellant, which said judgment affirmed a judgment of the Superior Court of King County, State of Washington, entered in said cause on the 8th day of July, 1914. Thereupon, and on the 23 day of July, 1914, a stipulation of the respective parties was filed, stipulating that notwithstanding any rule of this court the remittitur in said cause might be sent down forthwith to the Superior Court of King county, and thereupon, and on said 23 day of July, 1914, said remittitur was by this court sent down to the said Superior Court of King County, whereupon said judgment became final.

The said F. S. Pitney was and is aggrieved in that in said judgment and the proceedings had prior thereto in this cause, certain errors were committed to his prejudice.

This court is the highest court of this state in which a de-
49 cision in this action could be had. In said action, rights, privileges and immunities were claimed by your petitioner under the Constitution and statutes of the United States and under authority exercised under the United States, and the decision of this court was against the rights, privileges and immunities specially set up and claimed under said constitution statutes and authority, all of which will more fully appear in detail from the assignment of errors filed herewith.

Wherefore, said F. S. Pitney prays that a writ of error may issue to the Supreme Court of the State of Washington for the correcting of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the Supreme Court of the United States.

(Signed) W. T. DOVELL,
Attorney for said F. S. Pitney.

50 In the Supreme Court of the United States.

12157.

Filed Jul- 23, 1914. C. S. Reinhart, Clerk. F. S. G.

No. —.

F. S. PITNEY, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Assignment of Error on Writ of Error to State Court.

Comes now the plaintiff in error in the above entitled cause, and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of Washington erred to the grievous injury and wrong of the appellant in said cause and to the prejudice and against the rights of the plaintiff in error herein in the following particulars, to-wit:

I.

The court erred in directing the overruling of the demurrer of the appellant in said Supreme Court, the plaintiff in error, herein, to the amended information.

II.

The court erred in overruling the motion in arrest of judgment of the appellant in said Supreme Court, the plaintiff in error herein.

III.

51 The court erred in entering judgment and imposing sentence in said action against the appellant in said Supreme Court, the plaintiff in error herein.

IV.

The court erred in holding that the acts shown by the stipulation of the parties herein and by the judgment entered in the Superior Court of the State of Washington to have been committed by the said plaintiff in error herein, to-wit, the using and furnishing by the said F. S. Pitney in, with and in connection with and for the sale of certain goods, wares and merchandise, while he was acting as the agent and employe of the United Cigar Stores Company, Inc., and when the said United Cigar Stores Company, Inc., or the said F. S. Pitney, had not then nor theretofore obtained a license from the Auditor of the County of King of a certain stamp, coupon, ticket, certificate, card or device entitling the recipient thereof to procure from said United Cigar Stores Company, Inc., certain goods wares or merchandise free of charge, which said stamp, coupon, ticket, certificate, card or device was redeemable by the said

United Cigar Stores Company, Inc., alone, constituted a violation of Chapter 34 of the Laws of 1913, of the State of Washington, commonly known as the "Trading Stamp Act."

V.

The said Supreme Court erred in holding that the judgment and sentence imposed upon the said appellant therein, the plaintiff in error herein, did not deprive the said plaintiff in error herein of rights, privileges and immunities granted to the said plaintiff in error herein by Article V of the Constitution of the United States.

VI.

52 The said Supreme Court erred in holding that the judgment and sentence imposed upon the said appellant therein, the plaintiff in error herein, did not deprive the said plaintiff in error herein of rights, privileges and immunities granted to the said plaintiff in error herein by Article 8 of the Constitution of the United States.

VII.

The said Supreme Court erred in holding that the judgment and sentence imposed upon the said appellant therein, the plaintiff in error herein, did not deprive the said plaintiff in error herein of rights, privileges and immunities granted to the said plaintiff in error herein by section 1 of Article 14 of the Constitution of the United States.

VIII.

The said Supreme Court of the State of Washington erred in holding that the said Chapter 134 of the Laws of 1913 of the State of Washington, known as the "Trading Stamp Act," is not violative of Article 5 of the Constitution of the United States.

IX.

The said Supreme Court of the State of Washington erred in holding that the said Chapter 134 of the Laws of 1913 of the State of Washington, known as the "Trading Stamp Act," is not violative of Article 8 of the Constitution of the United States.

X.

The said Supreme Court of the State of Washington erred in holding that the said Chapter 134 of the Laws of 1913 of the State of Washington, known as the "Trading Stamp Act," is not violative of Section 1 of Article 14 of the Constitution of the United States.

XI.

53 The said Supreme Court erred in not reversing the judgment of the Superior Court of the State of Washington and granting to the said appellant therein, the plaintiff in error herein,

rights, privileges and immunities claimed therein under the Constitution of the State of Washington and the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, the said F. S. Pitney, plaintiff in error, prays that the judgment of the Supreme Court of the State of Washington be reversed and set aside and held for naught, and that judgment be rendered for plaintiff in error herein, granting him his rights under the laws of the United States.

(Signed) S. M. STROOCK.
30 Broad Street, New York City, N. Y.
(Signed) W. T. DOVELL,
661-670 *Colman Building, Seattle, Wash.,*
Attorneys for Plaintiff in Error.

54 In the Supreme Court of the State of Washington.

12157.

Filed Jul- 23, 1914. C. S. Reinhart, Clerk. F. S. G.

No. —.

STATE OF WASHINGTON, Respondent.
vs.
F. S. PITNEY, Appellant.

Allowance of Writ.

Comes now F. S. Pitney, the appellant above named, on this 23d day of July, 1914, and files and presents to this court his petition praying for the allowance of a writ of error intended to be urged by him; and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper.

Upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented, and it appearing to this court that in said action, as heretofore presented in said court, rights, privileges and immunities were claimed by petitioner under the constitution and statutes of the United States and under authority exercised under the United States, and that the decision of this court was against the rights, privileges and immunities
55 specially set up and claimed under said constitution, statutes and authority,

It is ordered by the court that a writ of error be allowed as prayed; provided, however, that said F. S. Pitney, appellant, give bond according to law in the sum of Five Hundred ($500.00) Dollars, which said bond shall operate as a supersedeas bond.

In testimony whereof, witness my hand this 23d day of July, A. D. 1914.

(Signed) HERMAN D. CROW,
Chief Justice of the Supreme Court of the State of Washington.

56 12157.

Writ of Error.

Filed Jul- 27, 1914. C. S. Reinhart, Clerk, F. S. G.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington before you, at the May term, 1914, thereof, being the highest court of law or equity of said State in which a decision could be had in said suit between the State of Washington, designated as plaintiff and respondent, and F. S. Pitney, designated as defendant and appellant, wherein rights, privileges and immunities are claimed under the Constitution and statutes of the United States, and the decision was against the rights, privileges and immunities specially set up and claimed under such Constitution, a manifest error hath happened to the great damage of the said F. S. Pitney, as by his complaint appears.

We, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Su-
57 preme Court may cause further to be done therein, to correct that error, what is right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 24 day of July, in the year of our Lord one thousand nine hundred fourteen.

Done in the City of Seattle and County of King, with the seal of the District Court of the United States for the Western District of Washington attached.

[Seal of the United States District Court, Western District of Washington.]

FRANK L. CROSBY,
Clerk of the District Court of the United States for the Western District of Washington.

Allowed by—
HERMAN D. CROW,
Chief Justice of the Supreme Court of the State of Washington.

58 [Endorsed:] (Original.) No. —. In the Supreme Court of the United States. F. S. Pitney, Plaintiff in Error, vs. State of Washington, Defendant in Error. Writ of Error. S. M. Stroock, 30 Broad St., New York, N. Y. and W. T. Dovell, 661-670 Colman Bldg., Seattle, Wash., Attorneys for Plaintiff in Error.

59 In the Supreme Court of the United States.

12157.

Filed Jul- 27, 1914. C. S. Reinhart, Clerk. F. S. G.

No. —.

F. S. PITNEY, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents:

That we, F. S. Pitney, as principal, and New England Casualty Company, a body corporate organized and existing under the laws of the state of Massachusetts and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the State of Washington in the full sum of Five Hundred ($500.00) Dollars, to be paid to said state of Washington, and for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 22nd day of July, 1914.

Whereas, the above named F. S. Pitney, plaintiff in error, seeks to prosecute his writ of error in the Supreme Court of the United States to reverse the judgment rendered in the action en-
60 titled "State of Washington, Respondent, vs. F. S. Pitney, Appellant", by the Supreme Court of the State of Washington;

Now, therefore, the condition of the above obligation is such that if the above named plaintiff in error shall prosecute his writ of error to effect and shall answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and virtue.

F. S. PITNEY,
By W. T. DOVELL, *His Attorney.*
NEW ENGLAND CASUALTY COMPANY,
[SEAL.] By A. H. KENAGA AND GEORGE M. CRAWFORD,
Its Attorneys in Fact.
SEELEY & COMPANY,
By C. M. SEELEY, *President,*
General Agent.

This bond approved this 23rd day of July, 1914.

HERMAN D. CROW,
Chief Justice of the Supreme Court of the State of Washington.

61 No. 1279.

This Power of Attorney must be attached to each bond executed or delivered by the Company's agents or attorneys in order to make it valid.

[Limited.]

Power of Attorney.

New England Casualty Company,
Home Office, Boston, Massachusetts.

Know all men by these presents:

That the New England Casualty Company, by Edward W. Briggs its Vice President, and William J. Lewis its Assistant Secretary, in pursuance of a certain resolution duly passed by the Board of Directors of said Company at a regular meeting of that body held on the 21st day of December, 1911, a copy of which is hereto attached, does hereby nominate, constitute and appoint C. M. Seeley or A. H. Kenaga, jointly with H. O. Price or George M. Crawford, or C. M. Seeley jointly with A. H. Kenaga—City of Town of Seattle State of Washington its true and lawful agents and attorneys-in-fact, to make, execute, seal and deliver for and on its behalf as surety, and as its act and deed, on behalf of any person, firm, copartnership, association, or corporation, bonds, undertakings, stipulations or obligations specifically printed on the reverse side hereof in classes marked A, B, C, D, E, F, G, H, I, J, K, L, or M, only, the amount of any one bond, however, not to exceed the sum stated and inserted after each class and which are made a part hereof, and the execution by the foregoing agents or attorneys of such bonds or undertakings in pursuance of these presents and when a duly executed power of attorney is attached thereto shall be as binding upon said company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company, at its office in Boston, Mass., in their own proper persons.

In witness whereof, the said Edward W. Briggs Vice President and William J. Lewis Assistant Secretary, have hereunto subscribed their names and affixed the corporate seal of the said New England Casualty Company, this nineteenth day of May A. D. 1914.

EDWARD W. BRIGGS,
Vice-President.

Attest:
WM. J. LEWIS,
Assistant Secretary.

62 At a regular meeting of the Board of Directors of the New England Casualty Company, held in its office in the City of Boston, Commonwealth of Massachusetts, on the 21st day of December, 1911, the following resolution was unanimously adopted, to wit:

"Whereas, it frequently becomes necessary for a representative of the company to execute a bond on behalf of the Company, which, for lack of time or some other cause, it is impossible to have executed by the regularly elected officers of the Company;

Therefore be it resolved, that the President, or either of the Vice-Presidents, by and with the concurrence of the Secretary or Assistant Secretary, is hereby authorized to empower any representative of the Company to execute, on behalf of the Company, any bond which the Company might execute through its duly elected officers."

I, William J. Lewis Assistant Secretary, of the New England Casualty Company, hereby certify that the foreging is a true copy taken from the Records of Proceedings of the Board of Directors of the New England Casualty Company, and is still in force.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the corporate Seal of the New England Casualty Company, this nineteenth day of May A. D. 1914.

[SEAL.] WM. J. LEWIS,
Assistant Secretary.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this nineteenth day of May A. D. 1914 before the subscriber, a Notary Public of the Commonwealth of Massachusetts, in and for the City of Boston, duly commissioned and qualified, came Edward W. Briggs Vice President, and William J. Lewis Assistant Secretary, of the New England Casualty Company, to me personally known to be the individuals and officers described in, and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signature as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Boston, the day and year first above written.

[NOTARIAL SEAL.] J. A. GALVIN,
Notary Public.

My Commission expires Oct. 2, 1919.

63 The following classes of bonds and no others are authorized under the foregoing Power of Attorney.

Class A: Judicial Bonds, Undertakings, Stipulations or Obligations, required of Litigants, to be filed in any Court in the State of Washington.

1 Appeal. 2 Attachment. 3 Certiorari. 4 Condemnation of Land. 5 Costs. 6 Counter-Replevin. 7 Damages. 8 Discharge of Attachment. 9 Discharge of Injunction. 10 Execution. 11 Forthcoming. 12 Garnishment. 13 Injunction. 14 Land Damage. 15 Libelants. 16 Mandamus. 17 Petitioning Creditors. 18 Postponement or Adjournment of Trial. 19 Release. 20 Removal of Cause. 21 Replevin. 22 Right of Way. 23 Stay of Execution. 24 Stay of Proceedings. 25 Stipulation for Costs. 26 Stipulation for Value. 27 Supersedeas. 28 Writ of Error. 29 Writ of Prohibition. 30 Release of Mechanics' Liens, the amount of any one bond, however, not to exceed the sum of twenty-five hundred ($2,500) dollars, and for

Class B: 1 Receivers or Trustees in Bankruptcy, required to be filed in any of the District or Circuit Courts of the United States, the amount of any one bond, however, not to exceed the sum of fifty thousand ($50,000) dollars, and for

Class C: 1 Agents. 2 Assignees. 3 Trustees. 4 Receivers. 5 Liquidators. To be filed in the State Courts or Federal Courts having jurisdiction in the State of Washington the amount of any one bond, however, not to exceed the sum of fifty thousand ($50,000) dollars, and for

Class D: For any Fiduciary in administration, Probate, Decedents, Orphans and Incompetents' Estates in the Courts of said State of Washington

1 Administrators. 2 Temporary Administrators. 3 Special administrators. 4 Administrator to collect. 5 Administrator with will annexed. 6 Administrator d. b. n. 7 Administrator to sell real estate. 8 Executors. 9 General Guardians. 10 Special Guardians. 11 Temporary Guardians. 12 Guardians ad litem. 13 Guardian for the sale of real estate. 14 Tutors. 15 Committee. 16 Committee on sale of real estate. 17 Curator. 18 Conservator. 19 Testamentary Trustee. 20 Trustee under deed to create an income. 21 Commissioners or Trustees for the sale of real estate, the amount of any one bond, however, not to exceed the sum of fifty thousand ($50,000) dollars, and for bonds

Class E: For any individual, firm, co-partnership, association, or corporation for the faithful performance of any and all contracts exacted by the United States Government, or the State of Washington or any County or Municipality in said State, or by any individual, firm, co-partnership, association, or corporation in the aforesaid State as follows

1 Construction Contracts. 2 Supply Contracts. 3 Bid or Proposal Bonds. 4 Maintenance Bonds (for a term not exceeding three years). 5. Dredging Contract Bonds. 6 Street Paving Bonds, the amount of any one bond, however, not to exceed the sum of twenty-five thousand ($25,000) dollars, and for bonds

Class F: For all persons in positions of trust for the faithful performance of duties exacted by employers of

1 Executive Officers. 2 Managers. 3 Superintendents. 4 Bookkeepers. 5 Salesmen. 6 Clerks. 7 Cashiers. 8 Agents. 9 Custodians. 10 Traveling Auditors. 11 Drivers. 12 Collectors. 13 Buyers. 14 Consignees. 15 Paymasters. 16 Timekeepers, the amount of any one bond, however, not to exceed the sum of five thousand ($5,000) dollars, and for

Class G: 1 Banks. 2 Trust Companies. 3 Savings Banks or Banking Institutions under the supervision of the Federal or State Governments, guaranteeing the security or repayment of funds on deposit in the State of Washington, the amount of any one bond, however, not to exceed the sum of five thousand ($5,000) dollars, and for

64 Class H: For any individual, firm, co-partnership, association or corporation requiring license or permit bonds in and by the State of Washington or any County, City, Town, Village or other Municipality located in said State as follows:

1 Basement Stairway. 2 Boiler. 3 Building Permit. 4 Drainlayer. 5 Drayman. 6 Electrician. 7 Explosive. 8 Express License. 9 Game Dealers. 10 Hoisting. 11 Opening Streets. 12 Plumbers. 13 Sewer Tappers. 14 Stationary Engineers. 15 Street Obstruction, the amount of any one bond, however, not to exceed the sum of ten thousand ($10,000) dollars, and for bonds

Class I: For any individual, firm, co-partnership, association or corporation, to be filed with the Collector of Internal Revenue of the Treasury Department of the United States Government in the State of Washington

1 Brewers. 2 Distillers. 3 Bonded Warehousemen. 4 Transportation Companies. 5 Tobacco Manufacturers. 6 Cigar Manufacturers. 7 Cigarette Manufacturers. 8 Tobacco Pedlers. 9 Manufacturers and Exporters, the amount of any one bond, however, not to exceed the sum of twenty-five thousand ($25,000) dollars, and for bonds

Class J: For any individual, firm, co-partnership, association or corporation, to be filed with the Collector of Customs to comply with the laws of the United States Government, Treasury Department, Customs Division as follows

1 Bond for Warehouse. 2 Covering delivery of unexamined packages, under Section XI "Pure Food and Drugs Act, June 30, 1906." 3 Custom House Cartmen's License. 4 Licensed Barges Boats and Lighters. 5 Common Carriers, the amount of any one bond, however, not to exceed the sum of ten thousand ($10,000) dollars, and for bonds

Class K: For any person in the service of the Federal Government. 1 Treasury Department. 2 War Department. 3 Navy Department. 4 Interior Department. 5 Department of Labor. 6 Department of Commerce. 7 Department of Justice. 8 United States Courts. 9 Department of State. 10 Post Office Department, the amount of any one bond, however, not to exceed the sum of five thousand ($5,000) dollars, and for bonds

Class L: For any person in the service of the State of Washington, County, City, Town, Village or other Municipality in said State

1 Treasurers. 2 Deputies. 3 Assistants. 4 Cashiers. 5 Clerks. 6 Messengers. 7 Officers of National Guards. 8 Collectors. 9 Sheriffs. 10 Registers. 11 Commissioners. 12 Assessors. 13 Notaries Public, the amount of any one bond, however, not to exceed the sum of five thousand ($5,000) dollars, and bonds for

Class M: For any person, firm, co-partnership, association or corporation, to be given to railroad, steamship and transportation companies

1 Payment of Freight. 2 Delivery of Freight without Bill of Lading. 3 Deferrage or stoppage of Freight. 4 Running Freight Cars into Warehouse without Bill of Lading, the amount of any one bond, however, not to exceed the sum of five thousand ($5,000) dollars.

Endorsed: Bond on Writ of Error.

65 12157.

Citation.

Jul- 27. 1914. C. S. Reinhart, Clerk. F. S. G.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Washington, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Washington, wherein F. S. Pitney is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Washington this 23rd day of July, 1914.

HERMAN D. CROW,
Chief Justice of the Supreme Court of the State of Washington.

Attest:

[Seal of the Supreme Court, State of Washington.]

FRED S. GUYOT,
Deputy Clerk of the Supreme Court of the State of Washington.

66 STATE OF WASHINGTON,
County of King, ss:

I, the undersigned, attorney- of record for the defendant in error of the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

——— ———,
Attorney General of the State of Washington.
JOHN F. MURPHY,
F. E. BRIGHTMAN,
D. V. HALVERSTADT,
GEO. R. TENNANT,
Prosecuting Attorney for King County, State of Washington.

Copy of within citation received at Olympia, Wash. this 23 day of July, 1914.

W. V. TANNER,
Attorney General;
——— ———,
Assistant Attorney General, Attorneys for State of Washington.

66½ [Endorsed:] (Original.) No. —. In the Supreme Court of the United States. F. S. Pitney, Plaintiff in Error, vs. State of Washington, Defendant in Error. Citation. S. M. Stroock, 30 Broad St., New York, N. Y., and W. T. Dovell, 661 Colman Bldg., Seattle, W'n, Attorneys for Plaintiff in Error.

67 In the Supreme Court of the United States.

No. —.

Filed Jul- 27, 1914. C. S. Reinhart, Clerk. F. S. G.

F. S. PITNEY, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Præcipe for Record, to be Returned with Writ of Error in the Above-entitled Cause to the Supreme Court of the United States.

To the Clerk of the Supreme Court of the State of Washington:

You will please prepare and transmit, under your hand and the seal of the supreme court of the state of Washington, to the supreme court of the United States, together with the writ of error issued by the Honorable Herman D. Crow, Chief Justice of the supreme court of the state of Washington, on the 23rd day of July, 1914, returnable to the supreme court of the United States, so that you have the same at Washington City on the 21st day of September, 1914,

as your return to said writ of error, a true copy of so much of the record in said cause in the supreme court of the state of Washington as is designated below, a true copy of the assignment of errors filed with the petition of the above named plaintiff in error for a writ of error, and a true copy of so much of all proceedings in said cause as is designated below, to-wit:

12157.

68 1. Information.
2. Amended information.
3. Demurrer to information.
4. Journal entry of July 29, 1913, in the superior court, showing that by stipulation the amended information was filed and demurrer theretofore interposed to the information was considered as interposed to the amended information; that demurrer to the amended information was sustained, that the state gave notice of its election to stand upon its amended information; that the case was thereupon dismissed, to which the state excepted both to the order of dismissal and to the sustaining of the demurrer interposed, and gave notice in open court of appeal to the supreme court.
5. Warrant for arrest.
6. Bail Bond.
7. Assignment of errors on appeal from the superior court, numbered 1 and 11 contained in the opening brief of appellant and filed in said cause on appeal in your office and found on pages 6 and 7 of said brief.
8. Opinion of the supreme court of the state of Washington filed in said cause on May 16, 1914.
9. Judgment of the supreme court of the state of Washington, of date May 28th, 1914.
10. Order of the superior court overruling demurrer in accordance with mandate of supreme court contained in remittitur in this cause.
11. Judgment, bearing date of the 8th day of July, 1914, reciting arraignment, plea of guilty upon part of the defendant, and the entry of the same; also stipulation of parties, and judgment and sentence of the said defendant, with notice of appeal in open court.
12. Motion in arrest of judgment.
69 13. Assignment of errors on appeal from superior court, numbered I, II and III, contained in the opening brief of appellant and filed in said cause on appeal in your office and found on page 2 of said brief.
14. Opinion of the supreme court of the state of Washington filed in said cause July 14, 1914.
15. Judgment of the supreme court of the state of Washington of the date of July 22, 1914.
16. Petition of F. S. Pitney for a writ of error.
17. Assignment of errors by F. S. Pitney filed with his petition for writ of error.
18. Order by Honorable Herman D. Crow, Chief Justice of the

supreme court of the state of Washington allowing writ of error and fixing amount of bond to operate as supersedeas.

19. Writ of error.

20. Bond of F. S. Pitney and New England Casualty filed July 25, 1914.

21. Original citation, together with admission of service thereof.

22. A copy of this præcipe together with acceptance of service thereof.

Dated: Olympia, Washington, July 27, 1914.

S. M. STROCK,
W. T. DOVELL,
Attorneys for Plaintiff in Error.

Præcipe Filed Jul- 27, 1914. C. S. Reinhart, Clerk.

70 In the Supreme Court of the United States.

12157.

No. —.

Filed Jul- 27, 1914. C. S. Reinhart, Clerk. F. S. G.

F. S. PITNEY, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Acceptance of Service.

STATE OF WASHINGTON,
County of King, ss:

I, the undersigned attorney- of record for the defendant in error in the above entitled cause, hereby acknowledge due service of copies of the following:

1. Petition for Writ of Error.
2. Allowance of Writ.
3. Writ of Error.
4. Bond on Writ of Error.
5. Assignment of Error on Writ of Error to State Court.
6. Præcipe for Record.
7. Citation.

All in the above entitled cause.

Dated: July 25, 1914.

(Signed) W. V. TANNER,
Attorney General of the State of Washington.

(Signed) JOHN F. MURPHY,
Prosecuting Attorney for King County.

71 In the Supreme Court of the State of Washington.

12157.

No. —.

Filed Jul- 27, 1914. C. S. Reinhart, Clerk. F. S. G.

STATE OF WASHINGTON, Respondent,
vs.
F. S. PITNEY, Appellant.

Acceptance of Service.

Due service of copies of the following is hereby acknowledged:
1. Assignment of Error on Writ of Error to State Court.
2. Petition for Writ of Error.
3. Allowance of Writ of Error.
4. Bond on Writ of Error.
5. Writ of Error.

All in the above entitled cause.
Dated this 24th day of July A. D. 1914.

JOHN F. MURPHY,
F. E. BRIGHTMAN,
D. V. HALVERSTADT,
GEO. R. TENNANT,
Attorneys for Respondent.

72 In the Supreme Court of the State of Washington.

No. 12157.

F. S. PITNEY, Plaintiff in Error,
v.
STATE OF WASHINGTON, Defendant in Error.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record of the above entitled cause as I have been directed by præcipe of the plaintiff in error to transmit to the United States Supreme Court.

I further certify that, in pursuance of the writ of error heretofore filed in this cause, I now transmit the said record, together with the original writ of error and the original citation, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed

the seal of the supreme court of the State of Washington at Olympia, this 1st day of September, 1914.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

73 **In the Supreme Court of the United States.**

No. —.

F. S. PITNEY, Plaintiff in Error,
vs.
STATE OF WASHINGTON, Defendant in Error.

Stipulation Amending Record.

It is stipulated, by and between the parties hereto, that the record herein may be amended by adding to page 38 thereof the statement that the stamp, coupon, ticket, certificate, card or device referred to in said record at said page is identical with the stamp, coupon, ticket, certificate, card or device described in the original information which was filed in said cause in the Superior Court of King County, State of Washington.

It is further agreed that this stipulation may be printed by the Clerk of the above entitled Court and become a part of the record herein.

Dated: October 10, 1914.

S. M. STROOCK,
W. T. DOVELL,
Attorneys for Plaintiff in Error.
W. VAUGHN TANNER,
JOHN F. MURPHY,
Attorneys for Defendant in Error.

74 [Endorsed:] 618/24362. Original. No. —. In the Supreme Court of the United States. F. S. Pitney, Plaintiff in Error, vs. State of Washington, Defendant in Error. Stipulation Amending Record. S. M. Stroock, W. T. Dovell, Attorneys for Plaintiff in Error.

75 [Endorsed:] File No. 24,362. Supreme Court U. S., October term, 1914. Term No. 618. F. S. Pitney, Plaintiff in Error, vs. The State of Washington. Stipulation to amend record. Filed October 15, 1914.

Endorsed on cover: File No. 24,362. Washington Supreme Court. Term No. 618. F. S. Pitney, plaintiff in error, vs. The State of Washington. Filed September 8, 1914. File No. 24,362.

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In the Supreme Court of the United States

OCTOBER TERM, 1914.

F. S. PITNEY,
Plaintiff in Error.
vs.
THE STATE OF WASHINGTON,
Defendant in Error.

No. [redacted] 2

MOTION TO ADVANCE HEARING OF CAUSE.

In Error to the Supreme Court of the State of Washington.

W. V[redacted] TANNER,
Attorney General of the
State of Washington,

JOHN F. MURPHY,
Prosecuting Attorney of
King County, Washington,
Attorneys for Defendant in Error.

THE IVY PRESS, THIRD AND CHERRY, SEATTLE

In the Supreme Court of the United States

OCTOBER TERM, 1914.

F. S. PITNEY,
Plaintiff in Error.
vs.
THE STATE OF WASHINGTON,
Defendant in Error.

No.....

MOTION TO ADVANCE HEARING OF CAUSE.

In Error to the Supreme Court of the State of Washington.

W. V[illegible]N TANNER,
Attorney General of the
State of Washington,

JOHN F. MURPHY,
Prosecuting Attorney of
King County, Washington,
Attorneys for Defendant in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

F. S. PITNEY,
Plaintiff in Error.
vs.
THE STATE OF WASHINGTON,
Defendant in Error.
No.....

MOTION TO ADVANCE HEARING OF CAUSE.

In Error to the Supreme Court of the State of Washington.

Comes now W. V[illegible] Tanner, Attorney General of the State of Washington, and moves the Court to advance from the docket so that it can be heard as speedily as the business of this Court will permit, and if possible in the month of December, 1914, or January, 1915, the above entitled cause, wherein F. S. Pitney is plaintiff in error and said

State of Washington is defendant in error, and respectfully represents:

That said cause is a criminal cause. It was instituted in the Superior Court of the State of Washington for the violation of Chapter 134 of the Laws of 1913 of the State of Washington, which chapter is as follows:

> "AN ACT relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device, for or with the sale of goods, wares and merchandise, and providing a penalty for violation thereof.
>
> Be it enacted by the Legislature of the State of Washington:
>
> Section 1. Every person, firm or corporation who shall use, and every person, firm or corporation who shall furnish to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm, or corporation any goods, wares, or merchandise, free of charge or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, shall before so furnishing, selling, or using the same obtain a separate license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person,

firm or corporation from which such furnishing or selling, or in which such using, shall take place.

Section 2. In order to obtain such license the person, firm or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought the sum of six thousand dollars, and upon such payment being made to the county treasurer he shall issue his receipt therefor which shall be presented to the auditor of the same county, who shall upon the presentation thereof issue to the person, firm, or corporation making such payment a license to furnish or sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in section 1 of this act. Such license shall contain the name of the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall be used at no place other than that mentioned therein.

Section 3. No person, firm or corporation shall furnish or sell to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares, or merchandise, any such stamps, coupons, tickets, certificates, cards, or other similar devices for use in any town, city or county in this state other than that in which such furnishing or selling shall take place.

Section 4. Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor."

The said plaintiff in error was convicted in the Superior Court of the State of Washington for King County of a violation of said act, which judg-

ment of conviction was thereafter upheld by the Supreme Court of the State of Washington, said Supreme Court being the court of last resort within said State of Washington having jurisdiction of said cause, and the said plaintiff in error has issued out a writ of error from this Court whereby there is sought to be presented to this Court the sole question of the validity of the said act of the State of Washington, it being averred by said plaintiff in error that said act is violative of Section 1 of Article XIV of the Constitution of the United States.

And said Attorney General does further represent that in an action begun in the United States District Court for the Eastern District of Washington, wherein John T. Little and others were complainants, and W. Vaughn Tanner as Attorney General of the State of Washington, and George H. Crandall as Prosecuting Attorney of Spokane County of the State of Washington, and others, were respondents, a final decree was entered by said Court adjudging said act of the Legislature of the State of Washington invalid as violative of Section 1 of Article XIV of the Constitution of the United States, and enjoining all of said respondents in said cause from taking any action by civil or criminal process or otherwise, to enforce the provisions of

said act or to collect the tax provided to be collected thereby. From said final decree an appeal has been prosecuted to this Court, and is now docketed as cause No. 525 in the October, 1914, Term of this Court. By stipulation of parties the said cause has been consolidated for the purpose of hearing and argument before this Court with this the above entitled cause.

Said W. Vaughn Tanner as said Attorney General does further represent: That a large number of persons and corporations are now doing business within the State of Washington in violation of said act, if the same is valid. That by reason of said final decree in said cause No. 525 above mentioned, said Attorney General and the officers of the various counties in the State of Washington within said Eastern District of Washington are restrained from attempting to enforce said act or attempting to collect the tax provided thereby to be collected. That said Attorney General does not desire to institute other actions in the Western Judicial District of the State of Washington because of said decree so rendered and entered by the United States District Court for the Eastern Judicial District of Washington. That by reason of said decree of the United States District Court for the Eastern District of

Washington, and the writ of error granted to said F. S. Pitney, the plaintiff in error in this cause, great delay is resulting, and the officers of the State of Washington are thereby prevented from enforcing said act and from collecting a large amount of revenue which is due to the State of Washington by reason of said act, if this Court shall adjudge the same valid.

Your petitioner believes and states the fact to be, that said persons and corporations so conducting business in violation of the terms of said act, are conducting the same in good faith, believing said act to be invalid and believing that the terms of said act cannot be observed by them without loss and interference with what they believe to be their property rights, but they are nevertheless laying themselves liable to the penalties provided by said act if the same shall be held by this Court to be a valid law of the State of Washington.

Respectfully submitted,

W. V[redacted] TANNER,
Attorney General of the
State of Washington,

JOHN F. MURPHY,
Prosecuting Attorney,
King County, Washington,

Attorneys for Defendant in Error.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

F. S. PITNEY,
Plaintiff in Error,
vs.
THE STATE OF WASHINGTON,
Defendant in Error.
No.....

In Error to the Supreme Court of the State of Washington.

NOTICE OF HEARING OF MOTION TO ADVANCE CAUSE.

To F. S. PITNEY, plaintiff in error, and to W. T. DOVELL, ESQUIRE, his attorney:

You, and each of you, are hereby notified that The State of Washington, the defendant in error above named, will, on Monday, the 26th day of October, 1914, upon the annexed motion and the copy of the entire record in this cause, at the opening of the Supreme Court of the United States on that

day, or as soon thereafter as counsel can be heard, submit the annexed motion (a copy of which is hereby delivered to you), to the Supreme Court of the United States at its court room in the Capitol in the City of Washington, District of Columbia.

W. V[redacted] TANNER,
Attorney General of the
State of Washington,

JOHN F. MURPHY,
Prosecuting Attorney of
King County, Washington,

Attorneys for Defendant in Error,
The State of Washington.

The foregoing notice is hereby accepted, and the delivery of a copy thereof and of the Motion to advance the hearing of said cause, is hereby acknowledged this ..... day of September, 1914.

.....

Attorney for F. S. Pitney,
Plaintiff in Error.

FILED
OCT 26 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 242

F. S. PITNEY,

Plaintiff in Error,

against

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Points for Plaintiff in Error.

LOUIS MARSHALL,
SOL. M. STROOCK.
Counsel for Plaintiff in Error.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 618.

F. S. PITNEY,
Plaintiff in Error,

against

THE STATE OF WASHINGTON.

In Error to the Supreme Court of the State of Washington.

Points for Plaintiff in Error.

The plaintiff in error seeks to review a judgment of the Supreme Court of the State of Washington, which affirmed his conviction by the Superior Court of the State of a gross misdemeanor, consisting of a violation of Chapter 134 of the Laws of 1913, for which there was imposed upon him a fine, together with the costs of the action, with a requirement that he be imprisoned in the county jail of King County "until such fine and costs are paid." (*Rec. pp. 18-20.*)

THE STATUTES INVOLVED.

The statute under which he was convicted reads as follows:

"An Act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device, for or with the sale of goods, wares or merchandise, and providing a penalty for violation thereof, as follows:

Be it Enacted by the Legislature of the State of Washington:

Section 1. Every person, firm or corporation, who shall use, and every person, firm or corporation who shall furnish to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm or corporation any goods, wares or merchandise, free of charge or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, shall before so furnishing, selling, or using the same obtain a separate license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, firm or corporation from which such furnishing or selling, or in which such using, shall take place.

Sec. 2. In order to obtain such license the person, firm or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought the sum of six thousand dollars, and upon such payment being made to the county treasurer he shall issue his receipt therefor which shall be presented to the auditor of the same county, who shall upon the presentation thereof issue to the person, firm or corporation making such payment a license to furnish or sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in Section 1 of this act. Such license shall contain the name of

the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall be used at no place other than that mentioned therein.

Sec. 3. No person, firm or corporation shall furnish or sell to any other person, firm or corporation to use, in, with, or for the sale of any goods, wares or merchandise, any such stamps, coupons, tickets, certificates, cards, or other similar devices for use in any town or county in this state other than that in which such furnishing or selling shall take place.

Sec. 4. Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor."

By Section 2267 of Remington & Ballinger's Annotated Code and Statutes of Washington, it is provided:

"Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both."

The Information.

Pursuant to these statutes, an information was filed against the plaintiff in error on June 17, 1913, which was amended on July 29, 1913, by which he was accused of the crime of using and furnishing stamps, coupons and certificates for and with the sale of goods, wares and merchandise, without a license (*Rec., pp. 1-6*). The crime was predicated on the following allegations (*Rec., pp. 6, 7*):

"The United Cigar Stores Company, Inc., in the County of King, State of Washington, on the 16th

day of June, 1913, being then and there a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and doing business in the State of Washington, did then and there own and conduct a certain store and place of business located at No. 803 Second Avenue, in the City of Seattle, and had not then, nor theretofore, obtained a separate license from the auditor of the said County of King, for the said store and place of business, as provided by law, entitling and authorizing the said corporation, at the said store and place of business, to use, or furnish to other persons, firms or corporations to use in, with, or for the sale of any goods, wares or merchandise any stamps, coupons, tickets, certificates, cards, or other similar devices, entitling the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm or corporation, any goods, wares or merchandise, free of charge or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, and"

"He, said F. S. Pitney, in the said County of King, State of Washington, at the said store and place of business at the said No. 803 Second Avenue in the said City of Seattle, well knowing the aforesaid things to be true, did then and there wilfully and unlawfully, as the manager, servant and agent of and on behalf of the said United Cigar Stores Company, Inc., use and furnish, in, with, in connection with, and for the sale of certain goods, wares and merchandise, to one John Garvin, a certain stamp, coupon, ticket, certificate, card and device, which did then and there entitle the said John Garvin, who then and there received said stamp, coupon, ticket, certificate, card and device with such sale of goods, wares and merchandise, to procure from said United Cigar Stores Company, Inc., upon the production of certain specified numbers of said stamps, coupons, tickets, cer-

tificates, cards, or other similar devices, certain goods, wares or merchandise, free of charge, contrary to the statute in such case made and provided."

The Certificate.

By stipulation (*Rec., p. 39*), it was agreed that the coupon so furnished by the plaintiff in error to the said John Garvin, was in the form stated in the original information (*Rec., p. 2*) as follows:

"No. 139,198. Dr.

United Cigar Stores Company (Incorporated).

Certificate.

Cash value at any Profit Sharing Station in the State of Washington, 1 cent, but average merchandise value, according to profit sharing list, 2 cents.

This certificate represents a twenty-five cent purchase and is redeemable according to the conditions of our profit sharing list. Ask for copy of list. Redeemable only by the person to whom originally issued.

United Cigar Stores Company (Incorporated).
Largest Cigar Retailers in the World."

The Facts and History of the Case.

The plaintiff in error demurred to the amended information, the demurrer was sustained, the cause was dismissed, and an exception was allowed (*Rec., p. 7*); whereupon the State appealed to the Supreme Court of Washington, which, by a divided court, Justices Mount and Gose, dissenting, reversed the judgment and remanded the cause to the Superior Court, with directions to overrule the demurrer (*Rec. pp. 8-14; State* v. *Pitney, 79 Wash. 608, 140 Pac. Rep. 918*). The demurrer

was thereupon overruled in the Superior Court (*Rec., pp. 14, 15*), and on July 8, 1914, it was stipulated, in court (*Rec. pp. 16 and 17*): that on July 16, 1913, the plaintiff in error, at the store of the United Cigar Stores Company Inc. and while he was acting as the agent and employee of that company and not otherwise, and when neither that company nor the plaintiff in error had then or theretofore obtained a separate license from the auditor of the County of King, for the said store and place of business, as provided by the statute, as the manager, servant and agent and on behalf of the United Cigar Stores Company, Inc., used and furnished in connection with and for the sale of certain goods to John Garvin, a stamp, coupon, ticket, certificate, card and device which entitled Garvin, who received the same, to procure from the United Cigar Stores Company Inc., on the production of a certain number of such certificates, certain goods, free of charge; that said certificate, so delivered to Garvin and so received by him "was redeemable by the said United Cigar Stores Company, Inc., alone and entitled said John Garvin to receive from the said United Cigar Stores Company, Inc., and from no other, by the production of certain specified numbers of said stamps, coupons, tickets, certificates, cards, or other similar devices, certain goods, wares or merchandise free of charge. The said stamp, coupon, ticket, certificate, card or device was by its terms made redeemable in goods, wares or merchandise as aforesaid, or one cent in cash, at the option of the holder as provided by the laws of the State of Washington." (*Rec. pp. 16, 17.*)

The plaintiff in error was thereupon adjudged guilty of the offense charged in the information,

and thereafter filed a motion in arrest of judgment, which was overruled, and the judgment now sought to be reviewed was pronounced. (*Rec. pp. 16, 17.*)

The Motion in Arrest of Judgment.

The motion in arrest of judgment, made before the imposition of sentence, after reciting the judgment, asked that Pitney be discharged, "for the reason that the facts stated in the information are not sufficient to constitute a crime or misdemeanor, for the reason that the statute of the State of Washington upon which said information is based, to wit, Chapter 134 of the Session Laws of 1913 of said State of Washington, * * * is violative of Section 1 of Article 14 of the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no State shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws." (*Rec. p. 15.*)

The Decision to be Reviewed.

An appeal was taken from this judgment to the Supreme Court of the State, where, on July 22, 1914, the judgment of the Superior Court was affirmed (*Rec. p. 23*), the opinion of the Court (*State* v. *Pitney, 80 Wash. 699, Rec. p. 22*) stating:

"By his assignments the appellant contends that the trial court erred in overruling the de-

murrer to the information, in overruling his motion in arrest of judgment, and in entering judgment and imposing sentence, for the reason that Chapter 134, Session Laws of 1913, upon which this prosecution is predicated is in violation of sections 3, 12 and 14 of Article I of the Constitution of the State of Washington, and is also in violation of Article V, Article VIII, and section 1 of Article XIV of the amendments to the Constitution of the United States, and is therefore void. These questions were all determined adversely to appellant's contentions on the former appeal prosecuted by the State. For the reasons announced in our former opinion in State *v.* Pitney, the judgment of the trial court is now affirmed."

Thereupon a writ of error to this Court was prayed for, and allowed by the Chief Justice of the Supreme Court of the State of Washington, and a writ of error was duly issued. (*Rec. pp. 24-28.*)

The Assignments of Error.

The Assignments of Error, so far as they are important to be considered, include the following:

1. "The said Supreme Court erred in holding that the judgment and sentence imposed upon the said appellant therein, the plaintiff in error herein, did not deprive the said plaintiff in error herein of rights, privileges and immunities granted to the said plaintiff in error herein by Section 1 of Article 14 of the Constitution of the United States."

2. "The said Supreme Court of the State of Washington erred in holding that the said Chapter 134 of the Laws of 1913 of the State of Washington, known as the 'Trading Stamp Act,' is not violative of Section 1 of Article 14 of the Constitution of the United States."

3. "The said Supreme Court erred in not reversing the judgment of the Superior Court of the State of Washington and granting to the said appellant therein, the plaintiff in error herein, rights, privileges and immunities claimed therein under the Constitution of the State of Washington and the Constitution of the United States."

POINTS

I.

The Washington statute under which the plaintiff in error has been convicted, violates the Fourteenth Amendment, in that it deprives him of his liberty and property without due process of law.

(a) The Essential Nature of this Statute.

The acts which constitute the alleged misdemeanor, were unquestionably valid at common law, and before the enactment of the statute which made them criminal. Pitney was the employee of the United Cigar Stores Company, Inc. That company conducted a retail cigar store at No. 803 Second Avenue, in the City of Seattle, a lawful business. In the ordinary course of that business, in connection with a purchase by John Garvin of merchandise to the amount of twenty-five cents, from the United Cigar Stores Company, Inc., as an inducement for his continued patronage Pitney delivered to Garvin a certificate issued by the United Cigar Stores Company, Inc.,

and redeemable by it alone, which entitled Garvin, at his option, to receive from the United Cigar Stores Company, Inc., and from no other person or corporation, upon the production of a specified number of similar certificates, in accordance with its list price, merchandise to be selected by him from the list, free of charge, each certificate so issued, representing goods, of the value of two cents, each certificate singly being at once redeemable for one cent in cash. Consequently the certificate on its face represented and was equivalent to a cash discount of four per cent upon the amount of the goods purchased or to a discount of eight per cent in other goods. The merchandise discount was greater than the cash discount for the obvious reason that the United Cigar Stores Company, Inc., was enabled as a quantity purchaser to acquire the goods given in redemption of the coupons issued, from the manufacturer, at wholesale prices. The benefit of this advantageous purchase was given to Garvin upon his election to receive such goods rather than cash, upon the redemption of his coupons. Had he elected to receive cash instead of goods for them and had he subsequently sought to purchase the same goods elsewhere, he would have been required to pay for them their regular retail price,—that specified in the Company's list.

Criminality has been attached to this act, solely because the United Cigar Stores Company, Inc., gave away this certificate, redeemable by it in merchandise, free of charge, in connection with the sale of its own goods, without having before using such certificate obtained a license for the store in which the certificate was furnished, and

without first paying for such license to the county treasurer of King County, the sum of $6,000 for one year.

That this statute is prohibitory, is frankly admitted by the Supreme Court of Washington, which regarded it as one prohibiting the use of such certificates, and stated the question for determination to be, whether such a prohibitory law was violative of the due process of law clause of the State or Federal Constitutions. (*Rec. p. 9.*)

The interpretation thus given to the Statute by the highest Court of the State will doubtless be accepted by this Court, as controlling.

That the act is in fact prohibitory, requires no argument. The imposition of a license fee of $6,000 annually for each place of business conducted by the United Cigar Stores Company, Inc., or by any merchant or dealer, carrying on a cigar, a dry-goods or a grocery store or other business, issuing certificates similar to those now under consideration, would make it impossible to carry on such business, and would necessarily mean the enforced discontinuance of the use of such certificates. As shown by the record in *Tanner* v. *Little*, argued herewith, the gross income from the sale of goods, of a large proportion of the stores in the State of Washington in which such or similar certificates are used, does not far exceed the sum of $6,000 annually and in many it does not equal that amount. It is safe to say that in a very few does the net income amount to this unprecedented license fee.

The statute does not proceed on the theory, that the use of such certificates by a merchant is immoral, dishonest, fraudulent, or contrary to public policy; otherwise it would not permit their

use. There is not a word in the statute which declares such use to be inherently unlawful. On the contrary, if the license fee is paid, the use of the certificates is permitted, without let or hindrance, to any extent desired, upon any plan or basis for their issuance or redemption that may be adopted. Any person, whoever he may be, whatever his character or his antecedents, so long as he pays the license fee sought to be exacted, is authorized to use the certificates. There is no *delectus personarum*. The sole condition imposed upon the person using these certificates, by the terms of the act is, that $6,000 shall be paid to the county treasurer. Upon his receipt for that amount the county auditor is to issue a license. Whoever pays that fee, irrespective of the manner in which his business is conducted, may proceed with it to his heart's content. Whoever does not pay the fee, however honestly he may carry on his business, however valuable may be the merchandise which he gives to his customer, however mutually advantageous the transactions accompanied by the issuance of a certificate may be to him and to his patrons, is guilty of a gross misdemeanor, and may be subjected to imprisonment for a period of one year.

(b.) *The Limitations on the Legislative Power.*

Such a consequence flowing from an otherwise innocent act, is so abhorrent to one's fundamental conceptions of individual rights, that it becomes natural to consider more closely precisely what such legislation means, and whither it leads. It must be conceded that, however extensive the powers of legisla-

tures may be to regulate business and occupations, there must, of necessity, under our constitutional form of government, be a limit beyond which legislation may not go. It is not permissible to prohibit the citizen from engaging in any of the usual and ordinary productive employments. It may not say to the butcher, the baker, the shoemaker, the tailor, the shopkeeper, the manufacturer, the merchant, or the miner, that his business may no longer be conducted. The fact that vegetarians, or those who have adopted the cult of walking barefoot, may for a time be in the majority in our several State legislatures, would not warrant the prohibition of butcher shops or the manufacture of shoes. It would be equally unwarranted, for the legislature to prohibit a business because it is conducted on a cash basis, or a credit basis; because it employs many clerks, or because it employs few; because it delivers merchandise sold to its customers, or because it does not; because it sells at a small profit, or at a large profit; because it resorts to advertisements to stimulate trade, or because it refrains from resorting to such a medium for seeking an enlarged volume of business.

Yet it is conceivable that, as a result of an epidemic fad, or of a general propaganda conducted by interested parties throughout the country, the legislatures of the several States may be in the control of majorities favoring theories which would result in the prohibition of some or many of the business methods just enumerated. Such legislation would be inconsistent with freedom. It would constitute despotism—it may be the despotism of a majority, but nevertheless despotism. It would be a repetition of the very tyranny which

eventually led to the evolution of constitutional government, designed to protect the natural rights of the individual and of minorities.

(c) *The Discarded Legislative Theories of Former Centuries.*

The several *Statutes of Labourers,* enacted in the reign of Edward III and for several centuries thereafter, among other things compelled every person, under penalty of imprisonment, to serve him that doth require him. They restricted the wages that were to be paid to servants, artificers and workmen. They fixed the prices at which victuals were to be sold. They limited the compensation of labourers in husbandry, and the going and coming of farm servants. They declared that cordwainers and shoemakers "shall not sell boots nor shoes, nor none other thing touching their mystery, in any other manner than they were wont" to sell them in 1345, "and that goldsmiths, saddlers, horsesmiths, spurriers, tanners, curriers, tawers of leather, taylors, and other workmen, artificers and labourers, and all other servants here not specified, shall be sworn before the justices, to do and use their crafts and offices in the manner as they were wont to do the said XX. year [prior to 1365], and in the time before, without refusing the same because of this ordinance. And if any of the said servants, labourers, workmen or artificers, after such oath made, come against this ordinance, he shall be punished by fine and ransom, and imprisonment after the discretion of the justices."

The several prices at which poultry might be sold, were likewise fixed by statute. Handicrafts-

men were prohibited from using "but one mystery." Merchants were forbidden "to use more than one sort of merchandise." It was enacted that "no goldsmith making white vessel shall meddle with gilding, nor they that do gild shall meddle to make white vessel." The diet and apparel of servants was prescribed. The cloth of which their garments were made it was declared "shall not exceed two marks, and that they wear no cloth of higher price, of their buying, nor otherwise, nor nothing of gold nor of silver embroidered, aimeled, nor of silk, nor nothing pertaining to the said things. And their wives, daughters, and children of the same condition in their clothing and apparel, and they shall wear no veils passing xii. d. a veil."

The apparel of handicraftsmen and yeomen, of gentlemen under the estate of knights, of merchants, citizens, burgesses and handicraftsmen, of the several sorts of clerks, and of plowmen and others of mean estate, was likewise prescribed.

In short, it was undertaken to restrict freedom of action in the ordinary affairs of men, in respect to legitimate employments and the most ordinary acts of common humanity, by the exercise of a power asserted through forms of legislation.

This legislation, though most drastic could not survive the aspirations for freedom innate in the Englishman. Act after act remained unenforced and unenforceable, because inconsistent with the first burgeoning of the spirit of liberty. Even Parliament could not give life to a system which betokened servitude. Long before the American Revolution such legislation had become obsolete in the land which boasted that no form of slavery could exist upon its soil. Laws of this nature

have therefore, ever been, or at least have hitherto been generally considered to be, contrary to the genius of our institutions.

(*d*) *The Definition of Liberty.*

This was strikingly announced by Mr. Justice Bradley in *Butchers Union Co.* v. *Crescent City Co., 111 U. S. 746, 762*:

"The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. * * * I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States. * * * But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen."

In *Powell* v. *Pennsylvania, 127 U. S. 678, 684*, Mr. Justice Harlan said:

"The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property,

is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law."

In *Allgeyer* v. *Louisiana, 165 U. S. 589,* Mr. Justice Peckham, speaking of a statute which prohibited the effecting of insurance on property in Louisiana in any marine insurance company which had not complied in all respects with the laws of that State, said:

"As so construed we think the statute is a violation of the Fourteenth Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In *Coppage* v. *Kansas, 236 U. S. 1, 14,* Mr. Justice Pitney said:

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among

such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money. * * * But the Fourteenth Amendment, in declaring that a State shall not 'deprive any person of life, liberty or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars the States from any unwarranted interference with either. * * * In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. But, in our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as they may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. *The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.*"

(*e.*) *The Impairment of Liberty and Property by this Statute.*

The legislation which we are now considering, impairs the liberty and interferes with the private property of those against whom it is directed, in the sense of the Constitution as thus interpreted.

A grocer or dry goods merchant who is desirous of increasing his patronage, of ingratiating himself with his customers, of continuing their goodwill, is told that he may not hold out to them an inducement of the most primitive character, under pain of imprisonment, if he does not conform to the prohibitory conditions of the statute. The mere fact that the gift or inducement takes the form of a stamp, coupon or certificate, is of no practical moment, since the written instrument represents the money or merchandise into which it is convertible. It is only a token.

Therefore, reducing the proposition to its lowest and simplest terms, the statute would, in effect, prohibit a merchant from making to his customer, in connection with a purchase made, a reduction in the usual price; from allowing him a discount in cash or in property; from sending him a Christmas turkey; from giving what is known in Louisiana as *lagnappe;* from conceding by way of good measure an additional ounce or pound or article; from delivering merchandise at the customer's house without extra expense; or from resorting to any other of the usual methods for creating good will, which have prevailed since commerce first began.

The present case is but a step beyond the most primitive form of inducement extended by a merchant to his customer—that embodied in the expression "a baker's dozen." Instead of making a gift of an article of the same kind as that purchased, the vendor affords the purchaser the option of taking either money or some other kind of merchandise which he may prefer as a substitute. The purchaser may from time to time accumulate the tokens which he receives, until they

reach an aggregate which will enable him to acquire, without cost to himself, an article for which he would otherwise be required to pay, and which is, therefore, to him, a thing of value. It may be ornamental or useful—a piece of furniture, a watch, a picture, a book, a tool, a rug, a garment. He is permitted to determine whether to take money or merchandise, and he may choose the particular article of merchandise for which he has a preference.

In the present case, the United Cigar Stores Company, Inc., issued the certificate, and it alone was to redeem it. In effect, therefore, the transaction is precisely the same as though, concurrently with the sale of cigars made by it, it had made a cash discount, or delivered an extra cigar, or any article acceptable to him selected from its shelves by the customer.

It is such a transaction as this that the present statute seeks to prohibit. The vendor, in the quaint language of the ancient statute, is to "use but one sort of merchandise," or "to use but one mystery." He is restrained from entering into a contract which involves the giving by him to his customer, free of charge, or for less than the retail market price thereof, in connection with the sale of merchandise, any other article of merchandise than that which is the principal subject-matter of the contract. At the same time it prevents the customer from entering into a contract whereby, in connection with the purchase of an article primarily desired, he is at the same time receiving another article, without increased cost, or at less than its retail market price.

The legislature is thus interfering with liberty of pursuit, as well as with liberty of contract. It is interfering with buying and selling legitimate

articles of merchandise. It is confining commerce in a strait-jacket. It is limiting methods of business, by making impossible one which in some form has been employed since the infancy of mankind.

(*f.*) *The History and Extent of Premium Advertising.*

This method of business, involving the giving of premiums by a merchant or manufacturer to his customer, on a large and systematic scale, has been employed for many years by those of the most conservative and reputable character. It was first introduced by B. T. Babbitt, in 1851, who offered to redeem a specified number of wrappers in which the cakes of soap which he sold were enveloped, by giving the purchaser in exchange for them a picture. His method was rapidly adopted by leading merchants in numerous branches of trade. Today the giving of premiums is resorted to by Arbuckle Brothers, Larkin Company, Proctor & Gamble, Colgate & Company, Armour, the Rumford Chemical Works, the Great Atlantic & Pacific Tea Company, and hundreds of others of the highest rank. It is used by many publishers of newspapers and magazines of high standing, who print upon their pages coupons, which are to be cut out by their readers, and when presented in specified numbers are exchangeable for a variety of articles. It is well known that such popular publications as *Youth's Companion* and *Ladies' Home Journal* have greatly prospered by means of the premium system. (*102 App. Div. 103, 110.*) The sole purpose which these purveyors of advertising have in view is to advertise themselves so that their circulation may be increased and the value of their good-will enhanced.

In a public address recently delivered by one prominently engaged in premium advertising, it was pointed out, that over $125,000,000 worth of merchandise is used annually in the United States for premium purposes, representing from two to three per cent of the gross amount of the accompanying purchases. This means that the sale of $3,500,000,000 of merchandise is directly promoted through premium distribution annually. The articles which carry premiums, must compete with those which do not, and it necessarily follows that if they fail to meet the competition of non-premium goods in quality, price and service, the public will withhold its patronage from those offering the premium. It has been computed that upwards of two thousand five hundred manufacturers produce goods which are used in whole or in part for premium purposes. This means that the employment and prosperity of a large number of workingmen are directly dependent upon the continued existence and success of premium advertising.

This method of business is, after all, but a form of advertising. The only difference between it and what is usually understood by that term, is that, in the one case, the money expended by the merchant goes to the newspaper, the printer, the street railway, the person maintaining a billboard or electric sign, while in premium advertising, the customer is the direct recipient of a considerable part of the cost of the advertising.

The extensive use of this system of advertising is so much a matter of common knowledge that many Courts, having under consideration statutes similar to that here involved, have referred to that fact.

In *People, ex rel. Appel* vs. *Zimmerman, 102 App. Div. 103,* decided in 1905, at page 105 the Court says:

"The method of inducing trade by giving stamps redeemable in merchandise to the purchasers *has become very extensive* and the device has developed in a variety of ways."

In *State, ex rel. Simpson* vs. *The Sperry & Hutchinson Company, 110 Minn. 378,* decided in 1910, after reviewing in detail the methods of advertising resorted to by merchants, says:

"This and similar methods of advertising by merchants have been followed so long and have become so thoroughly recognized as the legitimate exercise of personal rights and privileges under the Constitution, *that they are no longer the subject of legislation.*"

In *State, ex. rel. Hartigan* vs. *The Sperry & Hutchinson Company 94 Neb. 785,* decided December 23rd, 1913, the Court, referring to this system of advertising, said:

"It has grown to enormous proportions, and is now being carried on in practically every State in the Union."

Many State Courts of last resort, as well as Federal Courts, dealing with this method of advertising, have held it to be lawful.

In *State* vs. *Dodge, 76 Vt. 197,* it was said:

"Indeed it does not differ from the ordinary business except in the method of advertising and in lawful trade inducements. It is true that this method of doing business may enable a trader to do more business than he otherwise would do, and

more than his competitor across the street, but this furnishes no reason for prohibiting the business."

In *Young* vs. *Commonwealth, 101 Va. 853,* the Court after describing this method of advertising in great detail, says:

"As has already been said, it appears to be simply one of many devices fallen upon in these days of sharp competition between trades people to attract customers or to induce those who have bought once to buy again, *and in this respect is as innocent as any other form of advertising.*"

This case, therefore, assumes the additional phase of involving a merchant's right to advertise, viewed in its broadest aspect; for if he may be prohibited from attracting patronage by making a gift directly to his patron, he may be likewise prohibited from expending for any other form of advertising an equal amount of money, for the purpose of attracting customers. If it can be said that improvidence in making purchases is apt to be encouraged, where the customer is induced to make a purchase because, as an incident, he is to receive a gift of something additional to the merchandise bought, it is difficult to distinguish the case from one where alluring advertisements are published to attract such custom, where the purchaser himself receives nothing in addition to the goods bought, the entire amount expended in advertising being diverted from the customer to defray the cost of the advertising medium.

Some time after this premium advertising business came into vogue, the competitors of those employing it, relying more on the efficacy of legislative prohibition to suppress competition than

upon their business capacity and ingenuity to meet it, procured the passage of prohibitory laws, and have persisted ever since, by means of more or less ingenious devices, to conceal their real purpose, to accomplish their end. In the meantime the general public, which benefits by this form of competition, continues to patronize those who are prepared to share their profits and advertising expenses with the consumer.

(g) *People* vs. *Gillson.*

One of the first of the prohibitory laws enacted, was Section 335a of the New York Penal Code, which provided:

"No person shall sell, exchange or dispose of any article of food or offer or attempt to do so upon any representation, advertisement, notice or inducement that anything other that what is specifically stated to be the subject of the sale or exchange, is or is to be delivered or received or in any way connected with or part of the transaction as a gift, prize, premium or reward to the purchaser. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, in addition thereto, shall be liable to a penalty of twenty-five dollars, to be recovered, with costs, by any person suing therefor in his own name."

The validity of this provision was, in 1888, passed upon in *People* v. *Gillson, 109 N. Y. 389*, in an opinion by Judge Peckham, late a Justice of this Court, which as will presently be shown, was followed in many other jurisdictions. Gillson was charged with a violation of this section, in that he sold two pounds of coffee upon a representation that crockery and glassware were to be given to

the purchaser, and that he sold the coffee upon such representation, and delivered as a gift to the purchaser a teacup and saucer, which were received as a part of the transaction of the sale of the coffee. This law was held to be unconstitutional. Because of the importance of the decision, which passes upon the question here involved in its simplest and elementary form, we venture to quote from it extensively. After defining "liberty," in its constitutional sense, in the language adopted by this Court which we have above quoted, Judge Peckham proceeds (*p. 399*):

"It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields. By the provisions of this act a man owning articles of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed by such legislation. It is certainly lawful to sell (as in this instance) coffee. It is an article of food and is now almost one of the necessaries of life to a large number of people. A person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by

doing precisely what was done by the defendant in this case, and that while his profits on the same amount of coffee sold would be smaller than if he gave no present, yet by the growth of his trade his income at the end of the year would be more than by the old method. This statute, if valid, steps in to prevent his adopting such a course to procure trade, and from it to secure an income and livelihood for himself and family. He is thus restrained in the free enjoyment of his faculties, which he ought to have the right and liberty to use in the way of creating or adopting plans for the increase and growth of his trade, business or occupation, unless such restraint is necessary for the common welfare. This law interferes with the free sale of food, for the condition is imposed that no one shall sell food and at the same time, and as part of the transaction, give away any other thing. It is not material if by reason of the prohibition the owner's sales of food are greatly cut down and his ability to support his family thereby perhaps largely decreased. If the law is valid, the fact of its existence is a complete answer to the complaints of the owner of food, that his liberty to sell his property and his chance to make a livelihood are very greatly impaired. * * *

"The learned counsel for the People claims that the act is a valid exercise of the police power, in furtherance of the policy of the State to prohibit the setting up of lotteries and the sale of lottery tickets. A careful reading of the statute fails to show any such purpose. It prohibits the seller of goods from giving away any other thing as part of the transaction of sale, and as an inducement leading to it. It says nothing as to any lottery, and does not confine its prohibition to the giving away or distribution of any other article of property by virtue of any scheme founded upon chance. The act, in effect, absolutely prohibits the giving away of any other thing with the food sold and as part of the transaction of sale, wholly regardless of the means used to ef-

fect the giving away or delivery of such other article. * * * In this scheme the purchaser not only gets what he pays for, but by the very terms of the contract he has no chance to obtain anything more. In the purchase of two pounds of coffee he purchases the right to choose a certain article of crockery from a counter in full view, and he gets no chance to obtain anything else. * * *

"It is further argued, however, that the act is valid as a health law, a regulation of trade in food and to prevent dealing in impure, unwholesome and adulterated food. The same principles apply here as have already been stated, *i. e.*, there must be some fair and reasonable relation of means to end, which courts can see and admit the force of. We think it clear there is no such relation here. We think the act has not the slightest tendency to accomplish the alleged purpose. * * * The reasoning of counsel for the People is based upon the theory that no one will sell, as a matter of permanent business, an article at a price below what it costs him to procure it, and if he sell his coffee (in this instance), as low as the price thereof with other dealers, when he adds a gift at the time of the sale, he thereby reduces his profits below that of his competitor, and in order to prevent such a loss he will necessarily and inevitably sell an inferior or adulterated article. We think the reasoning is not sound. As has been before remarked, the inducement to purchase by reason of the gift may be so great that the sales are enormously increased, and the net profits at the end of the year may be greatly in excess of those of a dealer who makes no gifts and sells a correspondingly less amount of the food. It may simply be the old story of a small profit on large sales instead of a large profit on small sales. * * *

"I lay no stress whatever upon the argument that this kind of transaction naturally induces people to purchase more than they want of any article

of food in order to get the other article with it which comes to them in the shape of a gift, and thus the poorer people are led to extravagance in outlay. It may be remarked that in purchasing articles of food, even if one purchase more than is then absolutely necessary, the food need not be and, in all probability, is not wasted. But, aside from that, the argument is directed to that class of sumptuary legislation which, while good enough in some phases, is, when carried to minute details, simply unauthorized and illegal. * * *

"It seems to me that to uphold the act in question upon the assumption that it tends to prevent people from buying more food than they may want, and hence tends to prevent wastefulness or lack of proper thrift among the poorer classes, is a radically vicious and erroneous assumption and is to take a long step backwards and to favor that class of paternal legislation, which, when carried to this extent, interferes with the proper liberty of the citizen and violates the constitutional provision referred to. Equally unfounded, and for practically the same reasons, is the assumption that the law is valid as a law regulating trade and for the prevention of fraud and deception. It has no tendency to prevent either, and its regulation of trade is a mere arbitrary, unreasonable and illegal interference with the liberty of the citizen in his pursuit of a livelihood by engaging in a perfectly valid business, conducted in a perfectly proper manner. That a man engaged in trade will not for any length of time continue to sell an article below what it costs him to procure it is a safe assumption, while it is equally safe to say that he may do so for a time, long enough to enable him to introduce his article to the notice of the public and to create a demand for it which he will make a profit by supplying; or he may make a profit by supplying one article which will amount to enough to enable him to give away some other article with it and permit him to receive the average rate of profit in the business which he is engaged in. To prevent this by legis-

lative action does not reasonably or fairly tend to prevent fraud or deception in the sale of articles of food."

It is asserted by counsel for the State in his brief in *Little* v. *Tanner* (argued herewith) that the facts in the *Gillson* case disclose that the transaction there under consideration was one in which the customer did not receive any coupon or other certificate at the time of purchase, but received and was entitled to receive other merchandise at the same time in consideration of his purchase, without any coupon. If this were so, the distinction would be unimportant. But this is not the fact. It appears from the opinion of Judge Peckham at page 397 that the customer at the time of the purchase of one pound of coffee received a *check* which entitled him to nothing until he purchased another pound of coffee, when he would receive another *check* and these two checks together—not singly—upon their presentation entitled him to a gift of other merchandise. The contention that the *Gillson* case is not a "coupon" case is therefore unfounded. It is in its facts substantially identical with the case at bar—the single exception being that while the customer in that case was obliged to make more than one purchase and to obtain more than one *check* before he became entitled to receive additional merchandise, here *every coupon* given with *every* purchase was itself immediately redeemable *in cash* at the customer's option; or, he could obtain for them such merchandise as he might select, dependent on its list value and the aggregate number of coupons presented for redemption.

This decision has been followed with approval in a large number of cases relating to the premium advertising business, including,

Humes v. *City of Little Rock, 138 Fed. Rep. 929.*
State v. *Dalton, 22 R. I. 77.*
State ex rel. Madden v. *Dycker, 72 App. Div. 308.*
People ex rel. Appel v. *Zimmerman, 102 App. Div. 103.*
Young v. *Commonwealth, 101 Va. 853.*
State v. *Dodge, 76 Vt. 197.*
Winston v. *Beeson, 135 N. C. 271.*
State v. *Ramseyer, 73 N. H. 31.*
Ex parte Drexel, 147 Cal. 772.
Ex parte West, 147 Cal. 774.
Montgomery v. *Kelly, 142 Ala. 552.*
State v. *Sperry & Hutchinson Co., 110 Minn. 378.*
State v. *Caspare, 115 Md. 7.*
Opinion of the Justices, 208 Mass. 607.

(*h*) *Later New York Decisions.*

In 1900 a new section was added to the New York Penal Code, which sought to prohibit the issuance of trading stamps or other devices, and which provided:

"A person who shall:

1. Issue trading stamps or other devices to any person engaged in any trade, business or profession, with the promise, express or implied, that he will give to the person presenting to him such stamps or other devices, money or anything of value, without receiving from such person the value thereof, or make to any such person any

concession or preference in any way on account of the presentation of such trading stamps or other devices; or,

2. Being engaged in any trade, business or profession, shall distribute or present to any person dealing with him any such trading stamp or other device, in consideration of any article or thing purchased of or any services performed by him, shall be guilty of a misdemeanor.

3. It shall not be unlawful for any merchant or manufacturer to place his own tickets, coupons or other vouchers in or upon packages of goods sold or manufactured by him, such tickets, coupons or other vouchers to be redeemed by such merchant or manufacturer either in money or merchandise, whether such packages are sold directly to the consumer or through retail merchants; nor shall it be unlawful for any person to issue with such packages tickets, coupons or other vouchers so issued by such merchant or manufacturer."

This act was likewise declared to be unconstitutional, in *People ex rel. Madden* v. *Dycker, 72 App. Div. 308*, in an able opinion by Mr. Justice Chase, now an honored member of the New York Court of Appeals, who said:

"The prohibitive part of Section 384p aims at the practice of issuing trading stamps that are to be redeemed by any person other than the merchant who distributes them, or the manufacturer of the packages of goods sold. Just what there is in the thing prohibited, different from the thing expressly authorized, that makes it inimical to the public welfare and general safety does not appear. This record does not disclose any element of chance in the transaction. * * * The mere fact that the stamps are redeemable by an agent of the principal or by a third person does not seem to affect the transaction so far as public

safety and the general welfare of the community is concerned, or make it different from the transaction declared to be within the prohibition of the Constitution by the *Gillson* case. The court in the case of *State* v. *Dalton, 22 R. I. 77,* in discussing this question say: 'It is to be observed that the act does not prohibit the vendor himself from giving or "throwing in," as it is sometimes termed in common parlance, some other article in addition to that sold, but only prohibits the seller from giving anything in the nature of a check or order upon some other person, which shall entitle the holder thereof to obtain from such other person some article of merchandise in addition to the thing sold. In other words, the act recognizes the right of a person to give away any article of merchandise in connection with, and as an inducement to the making of, a sale of some other article, but provides in effect that the giving of such additional article must be done by him directly and not through a third person. We fail to see that there is any substantial difference in principle between the two methods, or that either bears any semblance to a lottery. The element of chance, which is the basal principle of every scheme in the nature of a lottery, is wholly wanting."

"In the same opinion the court, in illustrating its argument, says: 'A buys of B a suit of clothes for $20, and receives a check or stamp which entitles him to receive from C a pair of shoes worth $2, a hat worth $2, or a pair of gloves worth $2. It is true that A has not seen these articles at the time of purchasing the clothes, but as he knows that he is to receive one of the articles mentioned, as he may elect, we cannot see that there is anything so uncertain about the transaction as to appeal to the gambling instinct. At any rate, it does not in any real sense partake of the nature of a lottery. It is simply one of the infinite variety of devices which are resorted to by trades people in these days of sharp competition to promote the sale of their goods.'

"The same court, in considering the practice of

giving trading stamps and its effect upon business, says: 'It may be demoralizing to legitimate business for two great rival drygoods houses to cut prices in the attempt to undersell each other, or for two competing railway lines to sell tickets at half-price in the attempt of each to get an advantage over the other, yet, probably, no one would claim that such competition could be prohibited by law. "Bargain sales" and "bargain counters" may be demoralizing to business, but probably no one would claim that they can be abolished by law. The invention of labor-saving machinery may be said to demoralize business, and so may numerous other modern innovations in manufacturing and industrial pursuits whereby old methods have to be abandoned and new ones adopted. But whatever demoralization results therefrom is incidental to that principal of evolution which is everywhere manifest in the mercantile and industrial, as well as in the physical world. The great law of competition invites and promotes this sort of demoralization, and the remedy for one who is injured by it lies not in legislation, but in being able to keep pace with the changed, if not always improved methods.' "

In *People ex rel. Appel* v. *Zimmermann, 102 App. Div. 103*, a provision added to the New York Penal Law in 1904, which prohibited the dealing in trading stamps or coupon tickets unless the stamp or device should have legibly printed or written on the face thereof the redeemable value thereof in money, and which required them to be redeemed in goods or money, at the option of the holder, was held to be unconstitutional. In support of this decision Mr. Justice Spring said:

"We have, consequently, if this new effort is to be upheld, a perfectly lawful business emasculated, for the pivot on which it turns is the promise to deliver some article of merchandise to the

purchaser as an inducement to the purchase, and if money is to be the gratuity, then that ends the business, for that would mean that the seller reduces the purchase price in each instance by a definite sum. The rock on which the system is built is the redemption of the stamps in merchandise. The enormous quantities of this merchandise disposed of enables the company of redemption acting for a multitude of business concerns to purchase very close to actual cost, so that each person or firm in trade is not called upon to contribute the full sum with which it would be chargeable upon a cash redemption. While, therefore, the present statute is sought to be vindicated as a mere regulation of the traffic, it is apparent that if the ticket must be redeemed in money the business must cease and the statute is consequently prohibitory. * * *

"The present act is sought to be distinguished from those condemned in some of the cases referred to because in those cases the merchandise to be given away upon the presentation of the ticket was in the plain view of the purchaser. The distinction is more fanciful than genuine, for there can be little difference in selecting from sight or from a catalogue. In any event the purchaser when he buys knows that he will get the names of the prizes or gift articles from the catalogue and of a company not readily accessible to him. There is no deception. The prizes given by the publishers of the Youth's Companion or the Ladies' Home Journal or other publications as an inducement to subscribe for the periodical are not in full view but are described in pamphlets or in the publication itself. The transaction is not unlawful on that account for the subscriber is not deceived. He buys knowing the place where he is to get his prize and depends upon the printed description for his knowledge of it. There is no suggestion of a fraudulent purpose in the present scheme unless accompanying the delivery of the goods purchased with the promise to give something additional is fraudulent. There is no pretence that

the coupon ticket is not redeemable in accordance with the promise it contains.

"In a nutshell, therefore, the present statute is only designed to debar the giving of anything of value by a tradesman with the goods he sells, the gift being delivered by and pursuant to an kind of a transaction, honestly company, and that kind of a transaction, honestly carried out, cannot be prevented by the legislature."

(*i.*) *Massachusetts Decisions.*

In *Commonwealth* v. *Emerson, 165 Mass. 146,* there was involved the interpretation of an act prohibiting the sale of goods upon any representation that anything other than what is specifically stated to be the subject of sale is to be delivered. The defendant, a retail tobacconist, was arrested for selling packages of tobacco, which were sold with the statement that a photograph of a prominent person would be given with each package. Dealing with the statute there involved, Mr. Justice Holmes said:

"The sale prohibited is a sale upon any representation 'that anything other than what is specifically stated to be the subject of the sale' is to be delivered, etc. We must give these words a reasonable meaning. They were not intended, and do not purport, to forbid a sale of two things at once, even if one of them is the principal object of desire, and the other an additional inducement which turns the scale. If that had been the object, it would have been simpler and hardly more sweeping to have forbidden altogether the sale of more than one thing at a time. * * * We think it very plain that, if the offer of a single photograph with the tobacco would have been lawful, the offer of a choice out of a number is no less so."

In *Commonwealth* v. *Sisson, 178 Mass. 578*, the consideration of a later act on the same subject became necessary. The proof showed that the defendant was a clerk in a drug store and sold a hair brush to a customer, and at the same time, and as a part of the transaction, delivered to him twenty-five stamps or coupons which entitled the purchaser to demand of a stamp company any one of a number of articles on exhibition at the store of the company, which the purchaser might select. The stamp company named on the coupons was an association of individuals other than the proprietor of the drug store. The defendant offered to show that the merchant made a contract with the stamp company to give out its stamps with cash purchases, the stamps being afterwards taken to the stamp company's store and exchanged for articles selected by the buyer. The articles were on exhibition all the time, were of sound value, and the number of stamps necessary to obtain an article was indicated on the latter. Dealing with this statute, Chief Justice Holmes said:

"The act of 1898 cannot be taken to prohibit a rebate on the nominal price of goods, or the giving of this rebate in the form of another symbol of purchasing power instead of money, as for instance a draft upon another merchant, payable in goods. It prohibits the giving of coupons only to the same extent that the act of 1884 prohibits the giving of goods. Those who framed the act very probably had in mind the accomplishment of more than we take the act to effect, and of results which have been held unconstitutional elsewhere. *People* v. *Gillson, 109 N. Y. 389*, *Long* v. *State, 74 Md. 565*, *Ex parte McKenna, 126 Cal. 429*, *State* v. *Dalton, 46 Atl. Rep. 234*. See *City of Chicago* v. *Netcher, 183 Ill. 104*."

In 1911, the opinion of the Justices of the Supreme Court of Massachusetts was requested with respect to the constitutionality of a pending act, which subjected any person who should in any manner engage in any gift enterprise business to fine or imprisonment, and which provided that "every person who shall either as principal, agent, attorney or employee sell or offer for sale any real estate or article of merchandise of any description whatever * * with a promise, express or implied, to give or bestow, or in any manner hold out a promise of gift or bestowal of any article or thing for and in consideration of the purchase by any person of any article or thing * * * shall be deemed to be engaging in a gift enterprise." The several members of that great Court, in *208 Mass. 607,* unanimously answered the question in the negative, on the principles discussed in *Commonwealth* v. *Emerson, 165 Mass. 146, Commonwealth* v. *Sisson, 178 Mass. 578 and O'Keefe* v. *Somerville, 190 Mass. 110,* saying:

The bill is drawn in broad terms and it purports to forbid transactions that are not different in principle from contracts of sale, which always have been held to be within the constitutional right of persons in every state, to possess, to buy and sell and to get gain. * * * There is nothing in the conduct proposed to be prohibited that necessarily appeals to the gambling instinct or involves any element of chance. Such statutes and ordinances have been held unconstitutional by the highest courts in a large number of States." (Citing cases.)

(j.) Other Premium Stamp Decisions.

In addition to the cases above cited, the lawfulness of the trading stamp and premium advertising business has been sustained in the following:

FEDERAL DECISIONS.

Territory of Hawaii v. *Gunst, 18 Hawaii Rep. 196.*
Sperry & Hutchinson Co. v. *Weber, (Ill.) 161 Fed. Rep. 219.*
Sperry & Hutchinson Co. v. *Fisher, (Md.) Baltimore Daily Record, Oct. 7, 1905.*
Sperry & Hutchinson Co. v. *Temple, (Mass.) 137 Fed. Rep. 992.*
Ex parte Hutchinson, (Ore.) 137 Fed. Rep. 950.
Sperry & Hutchinson Co. v. *Brady, (Pa.) 134 Fed. Rep. 691.*
Sperry & Hutchinson Co. v. *Mechanics Cloth Co. (R. I.) 135 Fed. Rep. 833.*
Ex parte Hutchinson, (Wash.) 137 Fed. Rep. 949.
Sperry & Hutchinson Co. v. *Tacoma (Wash.) 190 Fed. Rep. 682.*
Van Deman & Lewis v. *Rast, (Fla.) 214 Fed. Rep. 827.*

STATE DECISIONS.

State v. *Shugart, 138 Ala. 86 (1903).*
Ex parte McKenna, 126 Cal. 429.
City and County of Denver v. *Frueauff, 39 Col. 20.*
Hewin v. *City of Atlanta, 121 Ga. 731.*
Long v. *Maryland, 74 Md. 565.*

State ex rel. Hartigan v. *Sperry & Hutchinson Co., 94 Neb. 785.*
Leonard v. *Bassindale, 46 Wash. 301.*

Similar in principle are

Schnaier v. *Navarre Hotel & Importation Co., 182 N. Y. 83.*
People ex rel. Moskowitz v. *Jenkins, 202 N. Y. 53.*
Hauser v. *North British & Mercantile Ins. Co., 206 N. Y. 455.*
State ex rel. Wyatt v. *Ashbrook, 154 Mo. 375.*

(*k.*) *Schnaier* v. *Navarre &c. Co.*

In the first of these cases, it was held that

Chapter 803 of the Laws of 1896, providing that it shall be unlawful for a copartnership in the City of New York to engage in the business of an employing or master plumber unless each and every member thereof shall have been registered, after examination and certification by an examining board of plumbers, so far as it prohibits the right to form a partnership for the purpose of carrying on the lawful business of an employing or master plumber, was unconstitutional and that it could not be sustained as a valid exercise of the police power of the Legislature because the registration of the firm as such or the registration of one or more of its members who are skilled plumbers to act for the firm would be a sufficient protection to the public from all the dangers that the legislation was supposed to prevent or mitigate. Judge O'Brien said:

"The right to follow any lawful pursuit is one of the inalienable rights of a citizen of the United States, and a law which prevents or hinders a man from going into partnership with another for the purpose of carrying on the trade, business or calling of employing or master plumbers, infringes his natural rights as secured by the Constitution. There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his house or restrain his otherwise lawful movements, are infringements upon his fundamental rights of liberty, which are under constitutional protection. The common business and callings of life, the ordinary trades and pursuits which are innocent in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same terms."

(*l*) *People ex rel. Moskowitz* vs. *Jenkins.*

In the second of the cases cited, the relator was arrested for conducting a transient retail business for the sale of goods represented and advertised as a bankrupt stock, without having obtained a license as required by Section 85 of the New York General Municipal Law. That section provided:

"No person, whether acting as principal or as agent for another, shall conduct a transient retail business in any store in any city of the third class, village or town of this state for the sale of goods which shall be represented or advertised as a bankrupt stock, or as assigned stock, or as goods dam-

aged by fire, water or otherwise, without first taking out a license therefor from the mayor of such city, president of such village, or the supervisor of such town. The amount of the fee for such license in any city shall be fixed by resolution duly passed by the board of aldermen or common council, and in a village by resolution duly passed by the board of trustees of such village, and in a town by resolution of the town board of such town. Such fee shall not be less than twenty-five dollars nor more than one hundred dollars per month in a city or incorporated village. * * * No such license shall be issued for a less period than one month and it shall be renewed monthly during the continuance of such business. The sum paid as license fees shall, in a city or village, be paid to the treasurer of such city or village, and in a town to the supervisor thereof, to be used for city, village or town purposes."

It was held that the act was unconstitutional, Chief Judge Cullen with his characteristic good sense, saying in language deserving of extensive quotation:

"If the statute can be sustained as an exercise either of the police power or of the power of taxation, the decisions below are right, and must be affirmed. We think it can be upheld from neither point of view, and shall first consider it as enacted under the police power. * * * It is said that the representation that the goods in question are a bankrupt or damaged stock induces customers to believe that they are of a high grade or quality and will be sold cheap, and for much less than their original cost, while as matter of fact they are of an inferior grade. That the representation may induce customers to believe that they can get a bargain may be assumed, but the representations enumerated in the statute have no relation to the quality and character of the goods, or, if any, certainly not to enhance or exaggerate

such character. * * * But, even though a statement that the goods had been damaged would be held an immaterial allegation in an action at law for fraud, I concede that no vender has a right to tell a falsehood as to his goods, be it material or immaterial, and that the legislature may properly pass laws to prevent or punish such false statements. *The legislation before us does nothing of the kind. If the man pays his license fee, he may sell the goods without penalty, though his statement that they are damaged or bankrupt stock is entirely untrue. He may utter any falsehood concerning his goods other than those mentioned in the statute, and he may sell without license fee. But a vendor may own goods which have been purchased at a sale of a bankrupt or damaged by fire, and he has the unqualified right to sell them and the unqualified right to tell the truth about them. He cannot under the exercise of the police power be prohibited from enjoying both these rights.* 'The right to buy, sell, barter, and exchange property is a necessary incident to its ownership, and, subject to reasonable regulations, is as much protected by this provision of the Constitution as is the ownership itself.' *City of Carrollton* v. *Bazzette, 159 Ill. 284.* In that case an ordinance enacted by the city authorities, under a statute which empowered the trustees to license, tax, regulate, suppress, or prohibit itinerent merchants and transient venders of merchandise, fixed the license fee for itinerant merchants at $10 a day. It was held unreasonable and void; that, as the city had no power to prohibit or suppress directly the business of the defendant, it had no power to do so indirectly by the imposition of unreasonable and oppressive burdens. If the statute provided that the transient trader should, as a condition of obtaining the license, make proof to the local authorities that the facts stated as to his stock of goods were true, and thereupon be subjected to a reasonable license fee covering the expense to which the municipality had been put, the statute would be upheld. But the exaction of $100 as a

license fee for a month or for less than a month in villages and cities of the third class (and this statute is confined to such municipalities and towns)—a sum exceeding the monthly rent of the majority of stores in such villages or cities—is too exorbitant to be upheld as a license fee in the strict sense of that term. These features of the statute plainly show its purpose, which was not to safeguard customers against fraud, but local shopkeepers from competition. The statute is of the same kind as that condemned by this court in People *v.* Gillson, 109 N. Y. 389. * * *

"As already conceded, the device of selling goods as bankrupt or damaged stock does excite the cupidity or economical instincts of customers and does tend to draw custom from other merchants, but a customer has the right to buy where he can buy cheap, and his means may unfortunately be so narrow that he is constrained to purchase damaged or unfashionable goods. The great department shops of New York do practically the same thing as that restrained by the statute. They advertise a reduction in prices of stock which they have been unable to freely dispose of, often to a point below cost. Every one has the right to adopt such means to sell his goods and conduct his business as he finds most profitable to him, provided those means are honest, and the fact that some persons engaged in the same business are dishonest does not justify legislation prohibiting either directly or indirectly the business. * * *

"It is undoubtedly true that the legislature may impose on professions, callings, businesses, and vocations license fees for the purpose of revenue, and, though termed license fees, they are enacted not under the police power, but under the power of taxation. There exists also in the legislature the right to classify vocations or businesses for the purpose of taxation. One class may be taxed at one rate and another class at another rate. But the right to classify, though very broad, is not absolutely unlimited. In *People ex rel., Far-*

rington v. *Mensching, 187 N. Y. 8,* we held that a law imposing a tax upon the sale and transfer of shares of stock at a specific rate per share instead of upon its real or nominal value was not a justifiable classification. * * * We held the same doctrine in *Matter of City of New York, 190 N. Y. 350.* Treating the statute and the ordinance passed under it as an exercise of the taxing power (though I have no idea it was ever intended as such), the classification is plainly arbitrary and unreasonable. Transient retailers might be subjected to a reasonable tax, but why a retailer who said his goods were bankrupt or damaged stock should be taxed $100 in a month, and a transient dealer who refrained from such statement should be taxed nothing, I am at a loss to imagine on any theory of taxation, though as a statute to prevent competition the reason for the distinction is apparent."

(*m.*) *Hauser* vs. *North British etc. Ins. Co.*

In the third of the cases cited, it appeared that the

New York Insurance Law, as amended by Chapter 748 of the Laws of 1911 and Chapter 1 of the Laws of 1912, provided:

"No person, partnership, association or corporation shall act as broker in the solicitation or procurement of applications for insurance or receive for services in obtaining or placing such insurance any commission or other compensation from any underwriter authorized or permitted to do an insurance business in this state, or agent thereof, without first procuring a certificate of authority so to act from the superintendent of insurance, which must be renewed annually on the first day of January, or within six months thereafter."

It further provided that, before any broker's certificate of authority should be issued, the applicant was to file a written application for such certificate, which must set forth "that the applicant is engaged or intends to engage, in good faith, principally in the insurance business, or that he conducts or intends to conduct such business in connection with a real estate agency or real estate brokerage business."

The plaintiff applied for a certificate, stating in answer to questions propounded pursuant to the statute, that he was engaged in the practice of the law and as an insurance broker in connection therewith, and refused to pledge himself otherwise as to the conduct of his future business. His application was therefore rejected, and his right to do business without a certificate and to recover commissions earned came to the court for determination. It was held that the act was unconstitutional, as being an arbitrary interference with the liberty of pursuing a lawful business. Judge Gray said:

"It is evident, from a reading of the provisions of this added section of the Insurance Law, that it was the purpose of the legislature to confine the business of the insurance agent, or broker, mentioned to those who should make that their principal business, or who should be real estate agents, or brokers. That was made a condition of the right to pursue the business. We may readily concede that, as a measure regulative of a business pursuit, which, from the extent to which it is carried on, is, presumably, affected with a public interest, the requirement by the legislature of a license would not be an unreasonable exercise of power. That would afford an opportunity for inquiry into antecedents and fitness of character, and be a reasonable enough precaution in the pub-

lic interest. But the legislature has prescribed in this statute a condition for the issuance of the license, which is a purely arbitrary restriction. There is no good reason, and no public interest can, conceivably, be subserved, in prohibiting persons from conducting the business of an insurance agent, or broker, in connection with any other lawful business, or occupation, in which they may be engaged. As it was intimated below, following the suggestion in *People* v. *Ringe, 197 N. Y. 143*, the legislation now in question must have been prompted in the interests of those engaged in the insurance brokerage business, alone, or in connection with a real estate brokerage business, rather than with any view of the public welfare. And see *People* v. *Gillson, 109 N. Y. 389*, at page 399. Why should those who wish to engage in the business of soliciting and placing insurance not be permitted to conduct it as incidental to, or in connection with, any other innocent occupation, except that of real estate brokers? Where the legislature may prohibit a business or an occupation, it may prescribe conditions upon which it may be conducted; but, if the business, or occupation, be useful to the citizen, and it be lawful, the Constitution, both of the State and of the nation, guarantees to him the right to pursue it freely, and any arbitrary restriction upon its pursuit should be condemned as an invasion of the guaranty. In varying language, but with the same thought, in very many cases, this court has pointed out that the constitutionality of an act is to be tested by its effect upon the citizen's right freely to pursue lawful occupations; that a statute under the guise of an exercise of the police power cannot arbitrarily interfere with that liberty of pursuit; that the equal protection of the laws means equality of opportunity to all in like circumstances; and that classification to be valid must not be arbitrary and discriminate against persons without a basis in reason. These principles have become familiar from frequent statement in the decisions and need no citation, nor discussion, of

the cases here. They have become constituent elements in our popular form of government. The very nature of our free government forbids that a man should be compelled to refrain from acts which the laws permit."

"The statute before us goes far beyond what is proper regulation and is prohibitory, in preventing a person from pursuing the occupation of an insurance broker, except as his principal business, or as an adjunct to real estate business. * * * The restriction is not in the public interests; it is obviously in the interests of the class, either of insurance, or of real estate, brokers. The insurance underwriters are not forbidden to transact their business through brokers. They are required to limit it to the class of brokers authorized by the statute. * * * This plaintiff had built up a brokerage business, in connection with his other occupation—as many, presumably, others have done holding, similarly, fire exchange brokers' certificates. But, under this statute, he is compelled to refrain from it, unless pursued under conditions which involve the sacrifice of that other occupation. Arbitrarily, the statute interferes with a citizen's business pursuits and, by an unreasonable discrimination, deprives him of that equal opportunity, which the Constitution guarantees to him."

(n) *State ex rel. Wyatt* vs. *Ashbrook.*

In the fourth of these cases, it was held that the sale in one store or building, under one head or unit of management, of various articles enumerated in the several classes or groups designated by the Missouri anti-department store act of May 16, 1899, cannot be deemed harmful and dangerous so as to be subject to regulation by the police power, merely because fifteen or more persons may be employed in the establishment, if

it is innocent and harmless to sell articles of any one class or group, and also to sell those of different classes or groups in establishments employing less than fifteen persons. Due process of law was held to be denied when any particular person of a class or of a community is singled out for the imposition of restraints or burdens not imposed upon, or to be borne by, all of the class of the community at large, unless the imposition or restraint be based upon existing distinctions that differentiate the particular individuals or the class to be affected from the body of the community. Mr. Justice Robinson said:

"Does the act in question, by the imposition of the license fee provided for therein, infringe upon the liberty of the citizen whom it is to affect, or his right to the enjoyment of the gains of his industry, or its equivalent, his property? If the terms 'life,' 'liberty' and 'property' as used in the Constitution, are 'representative terms, and cover every right to which a member of the body politic is entitled under the law,' as said by Sherwood, J., in *State* v. *Julow*, *129 Mo. 172, 29 L. R. A. 258*, and that within this comprehensive scope are embraced the right to buy and sell as others may, and to pursue such honest calling, vocation, or business as the citizen may choose, subject only to such restraints or the imposition of such burdens as may be required or imposed for the general good, and if 'due process of law' is to be defined as 'the law of the land,' designed to protect and preserve the rights of the citizen against arbitrary legislation, as well as against arbitrary executive or judicial action, then 'due process of law' is denied when any particular person of a class or of the community is singled out for the imposition of restraints or burdens not imposed upon and to be borne by all of the class, or of the community at

large, unless the imposition or restraint be based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community; and this question as to whether the persons thus designated constitute a natural or a reasonable class depends upon facts which the court passing upon the validity or invalidity of the legislation must determine upon. While the legislature, under its vested authority and power, may arbitrarily impose taxes, restraints, and burdens of various kinds, within the constitutional limitations prescribed, that may become most onerous and oppressive to the citizen, which the courts can do naught but uphold, it cannot create conditions or fiat classes that will operate to make legislation alone applicable to those artificial conditions and classes as general law within the meaning of the Constitution, or that will entitle it to the designation of 'the law of the land,' or that will make the act 'due process of law' by which alone the liberty of the citizen may be restrained, or his property burdened or disposed of. * * * It is special legislation unrestrained. To have made the act apply to all merchants of a given avoirdupois, or to those employing clerks of a designated stature, or to those doing business in buildings of special architectural design, would have been as natural and as reasonable a classification, for the purpose in view, as the classification made by this act."

(*o.*) *Smith* vs. *Texas.*

This Court has had occasion recently to deal with the principle involved in the present case, in *Smith* v. *Texas, 233* U. S. *630.* There a statute prohibited any person from acting as a conductor on a railroad train without having for two years prior thereto worked as a brakeman or conductor of a freight train and prescribing no

other qualifications. It was held to be violative of the Fourteenth Amendment, because it excluded the whole body of the public from the right to secure employment as conductors, and amounted to an arbitrary test by which competent persons were excluded from lawful employment. In the course of his opinion, Mr. Justice Lamar said:

"Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling. If the service is public the State may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. *Ex parte Lockwood, 154 U. S. 116; Hawker* v. *New York, 170 U. S. 189; Watson* v. *Maryland, 218 U. S. 173.* A private employer may likewise fix standards and tests, but, if his business is one in which the public health or safety is concerned, the State may legislate so as to exclude from work in such private calling those whose incompetence might cause injury to the public. But as the public interest is the basis of such legislation, the tests and prohibition should be enacted wth reference to that object and so as not unduly to 'interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.' *Lawton* v. *Steele, 152 U. S. 137.* * * *

"The statute here under consideration permits those who had been freight conductors for two

years before the law was passed, and those who for two years have been freight conductors in other States, to act in the same capacity in the State of Texas. But barring these exceptional cases, the act permits brakemen on freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification, for appointment as conductor, than that for two years the applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train."

(*p.*) *The Police Power as Subordinate to the Constitution.*

But it is argued that this legislation is proper under the police power. This proposition has, in part, been anticipated in some of the citations above presented, and is discussed with great ability in various of the opinions which have rejected as unconstitutional, legislation seeking to prohibit trading stamp and premium advertising.

Although the police power is extensive, and there is a present tendency to enlarge its boundaries, it is nevertheless subordinate to the constitutional guaranties of life, liberty and property. This was admirably expressed by Mr. Justice Peckham in *Lochner* v. *New York, 198 U. S. 56*:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power

by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

"This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court. * * *

"It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more

direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

This principle was practically reiterated in *Coppage* v. *Kansas, 236 U. S. 1.*

The same idea was clearly expressed by Judge Werner in *Wright* v. *Hart, 182 N. Y. 333*, where, after referring to the definition of "liberty," in its constitutional sense, as laid down in *Allgeyer* v. *Louisiana, supra, State* v. *Loomis, 115 Mo. 307*, and other cases, and applying it to the case under consideration, he said:

"Let us again emphasize the assertion that we do not question the power of the legislature to enact reasonable laws for the prevention of fraud and the protection of creditors. That this right falls within the general scope of the police power no one will deny. But the police power only begins where the Constitution ends. Broad and comprehensive as the police power concededly is, and incapable of precise definition or exact demarkation as we know it to be, it is never difficult to determine that its limits have been transcended when it is clear that the sacred domain of the Constitution has been trespassed upon. And when the exercise of the police power clearly infringes upon vested constitutional rights, courts should not concern themselves with the probable purposes for which it is exercised, or the evils which it was designed to correct. First the Constitution and then the police power. The statute under consideration sweeps away the constitutional rights of liberty and property of a limited class of our citizens who are entitled to the equal protection of the laws with all other citizens. It invades the right of liberty because it arbitrarily and unnec-

essarily denies the right of a specified class of citizens to contract for, bargain and sell a particular kind of property. It violates the Constitution in prohibiting all sales of merchandise in bulk, whether honest or dishonest, except upon conditions that are harsh, drastic, unreasonable and unnecessary in so far as they do not tend to effectuate the objects for which such a statute may properly be enacted. It ignores the constitutional guaranty relating to property rights because it so restricts the right of contract as to deprive property of its characteristics as such."

It has been well said:

"Under our form of government, however, courts must regard all economic, philosophical and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written Constitutions. * * * In our country the Federal and State Constitutions are the charters which demark the extent and the limitations of legislative power; and while it is true that the rigidity of a written constitution may at times prove to be a hindrance to the march of progress, yet more often its stability protects the people against the frequent and violent fluctuations of that which, for want of a better name, we call public opinion."

It has been contended, that the police power, is the power to govern. While perhaps a good epigram, it is inaccurate as a definition. It may be literally true when applied to an absolute monarch, who is not subject to any restraint except that which is self-imposed; yet, under a form of government like ours, the power to govern is subject to fundamental constitutional limitations, the most important of which are enshrined in the

Fourteenth Amendment. Its guaranties control and restrict the exercise of the police power. Hence the aphorism would only be correct, if it declared that the police power is the power to govern, subject to controlling constitutional limitations.

It may be useful to pass in rapid review a number of principles which have been laid down by various courts with respect to the undefined and undefinable police power which have a special bearing upon the present case.

Police regulations cannot arbitrarily interfere with the enjoyment of the rights of property or the personal rights guaranteed by the Constitution.

> *Otis* v. *Parker, 187 U. S. 606.*
> *In re Kelso, 147 Cal. 609, 2 L. R. A., N. S. 796.*

Where business in itself is harmless and legitimate, the power of the State to regulate it is not the equivalent of the power to destroy.

> *Commonwealth* v. *Atlantic Coast Line Co., 106 Va. 61, 7 L. R. A., N. S., 1086.*

If a restriction or regulation is without reason or necessity, it cannot be enforced.

> *Bryan* v. *Chester, 212 Pa. St. 259, 61 Atl. Rep. 894.*

Regulation which impairs or destroys rather than preserves or promotes is within the condemnation of the constitutional guaranties.

> *State* v. *Phillips, 144 Wis. 1, 35 L. R. A., N. S., 353.*

It has been said that the scope of the term "reasonable" as regards any situation must be measured as having regard to the fundamental principles of human liberty as understood at the time of the formation of the Constitution, adapting the same to modern conditions.

Bonnett v. *Vallier, 136 Wis. 193, 17 L. R. A., N. S., 486.*

It is also said that in proportion to the severity or extent of the police power must a strict observance of the constitutional limitations upon that power be required, and consequently it has been said to be a proper test: Is the prohibition of a particular business or the sale of a particular article necessary to prevent the infliction of a public injury? It is not sufficient that the public sustains harm from a certain trade or employment as it is conducted by some engaged in it; that many men engaged in the calling persist in so conducting the business that the public suffers, and their acts cannot otherwise be effectually controlled, is no justification for a law which prohibits an honest man from conducting a business in such a manner as not to inflict injury upon the public.

Tolliver v. *Blizzard, 143 Ky. 773, 34 L. R. A., N. S., 890.*

A determination by the legislature as to what is a proper exercise of the police power is not final and conclusive, but is subject to the supervision of the courts.

Lawton v. *Steele, 152 U. S. 133.*
McLean v. *Arkansas, 211 U. S. 539.*

Foster v. *Scott, 136 N. Y. 577.*
Colon v. *Lisk, 153 N. Y. 188.*
Frank L. Fischer Co. v. *Woods, 187 N. Y. 90.*

Hence legislative bodies, under the guise of police regulation avowedly protecting the public welfare, cannot arbitrarily pass laws which have no relation to that object. Whether the police power has been exercised within the proper limitations, whether or not a law is reasonable, whether or not a particular measure is designed to further some governmental function or to further private gain, and whether an act bears any reasonable relation to the public purpose sought to be accomplished, are all judicial questions.

Chicago, B. & Q. Ry. Co. v. *Illinois, 200 U. S. 561.*
People v. *Gillson, 109 N. Y. 389.*
State v. *Dalton, 22 R. I. 77, 48 L. R. A. 775.*

(*q.*) *Noble State Bank* v. *Haskell.*

In the court below, stress was laid on an expression contained in the opinion of Mr. Justice Holmes in *Noble State Bank* v. *Haskell, 219 U. S. 104*, where he declared:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States, 167 U. S. 518.* It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

It would certainly be a misuse of terms to say, that the prohibition of the use of trading coupons or certificates, such as are involved in this case,

would meet "a great public need." On the contrary, experience throughout the country indicates, that the use of premium advertising is generally approved, encouraged and stimulated by the public. Without participation in and acceptance by the latter of that method of doing business, it would be short-lived. Instead of disclosing a constantly growing volume of transactions, it would fall into desuetude. It would not require legislation to destroy it, for it would die of inanition. A method of business which carries sales to the amount of $3,500,000,000 annually, is not one which could possibly flourish unless it responded to a public need or demand. These sales involve millions of independent individual contracts, annually. It has yet to be shown that any of the contracting parties has indicated a desire for the abolition of this kind of business, or that the public welfare has suffered in consequence of its continuance.

Moreover, to use the phrases contained in the opinion cited, this business "is sanctioned by usage," and it is upheld "by the prevailing morality" and by "strong and preponderant opinion." It has been sustained by the affirmative adjudications of at least twenty-eight different tribunals, in as many jurisdictions.

The mere fact that, from time to time, legislatures in these several States, or municipal councils in some of them, have undertaken to prohibit the business, by no means indicates that such prohibition is held "by strong and preponderant opinion to be greatly and immediately necessary to the public welfare." The mere enactment of such legislation is not sufficient evidence of such preponderant opinion; otherwise any law

passed by a legislature, however unreasonable and arbitrary, however destructive of life, liberty and property, might be upheld under the police power. In that view the several State Legislatures could by their own acts annul the Fourteenth Amendment.

The very fact that there has been a persistent effort, to enact such legislation in various States, for the suppression of what is the exercise of a natural right and the practicing of a normal method of business, affords a strong reason for doubting its spontaneity, or that it is the expression of a great public need. To quote again from the opinion of Judge Peckham in *People* v. *Gillson, supra,* where he speaks of this form of legislation:

"It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which will operate favorably to them or unfavorable to their competitors in the commercial, agricultural, manufacturing or producing fields."

With the same thought in view, Judge Werner said in *Wright* v. *Hart, 182 N. Y. 343*:

"It is said also that similar statutes, some of them much more drastic, have been adopted in twenty different States or jurisdictions. Twenty wrongs can never make one right. There is, moreover, a singular, not to say suspicious, coincidence in the time and substance of all this legislation. We are indebted to our brother Bartlett for the

suggestion that more than half of these statutes were enacted in 1903 and 1904, and nearly all of them since 1900. Statutes that are passed *pro bono publico* rarely sweep the country with such irresistible momentum, while much fantastic legislation has resulted from organized crusades upon legislatures by the advocates and supporters of special classes. This statute 'is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition and, therefore, flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors.' (Peckham, J. in *People* v. *Gillson, 109 N. Y. 389.*)"

So in *Coppage* v. *Kansas, 236 U. S. 1,* it was pointed out, in the dissenting opinion of Mr. Justice Day, that statutes like the Kansas act there under consideration, had been passed in California, Colorado, Connecticut, Indiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Porto Rico and Wisconsin, as well as by the Congress of the United States, as evidenced by *Adair* v. *United States, 208 U. S. 161.* Nevertheless this Court, deeming such legislation to be violative of liberty of contract as guaranteed by the Constitution, adjudged its invalidity.

Incidentally, it may here be said in answer to the suggestion of our opponents that an effort has recently been made to persuade Congress to enact a law prohibiting the issuance of profit-sharing coupons in connection with sales of merchandise that the project was defeated in Committee by a decisive vote.

While a strong and preponderant public opinion may at times constitute a test in determining whether an act amounts to a reasonable exercise of the police power, that test becomes ineffectual whenever it encounters a fundamental right of life, liberty and property as guaranteed by the Fourteenth Amendment. The opinion of an overwhelming majority of the electorate of any State, cannot take from A his property and give it to B. It cannot even take from A his property and appropriate it for a public use, without just compensation. It cannot subject the lowliest citizen to imprisonment, or take from him his life without due process in the courts. It cannot deprive him of his right to earn a livelihood; to engage in trade, commerce or manufacture or to exercise his liberty of pursuit as defined by the decisions of this Court.

That this Court did not intend to subordinate the constitutional guaranties to the actual exercise by the legislature of the police power, as is by some erroneously believed, is made clear by the opinion of Mr. Justice Holmes on denying leave to file a petition for rehearing in *Noble State Bank* v. *Haskell, 219 U. S. 580,* when he said:

"The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past not to give a new or wider scope to the power."

To this may be added the graphic expression in the main opinion (*219 U. S. 112*):

"With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."

(r) *German Alliance Insurance Co.* vs. *Kansas.*

It has also been contended, that the decision in *German Alliance Insurance Co.* v. *Kansas, 233 U. S. 389,* affords justification for the alleged exercise of the police power in the present case. But this is not so. It has been well settled that a business which constitutes a public utility, holds such a peculiar relation to the public interests, that there is superimposed upon it the right of public regulation. Such was the decision in *Munn* v. *Illinois, 94 U. S. 113,* in *Budd* v. *New York, 143 U. S. 517* and in *Brass* v. *Stoeser, 153 U. S. 391.*

Whether or not the business of fire insurance was affected by a public use to such an extent as to admit of rate regulation, was the sole question involved in the case cited. It was concluded that that business involved such a public interest as could be made the basis of legislative regulation, including personal contracts entered into in the ordinary course thereof. In his careful opinion, Mr. Justice McKenna showed that there had existed regulation of insurance contracts, varying in detail and extent in practically every State of the Union, beginning in Massachusetts in 1837 and in New York in 1853. He then continued:

"Those regulations exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis. * * * We can see, there-

fore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing *whose effect stops with the individuals.* * * * The restrictions upon the legislative power which complainant urges we have discussed, or rather the considerations which take, it is contended, the business of insurance outside of the sphere of the power. To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern. It is, therefore, within the principle we have announced."

"But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without

much concern, leave our discussion to take care of itself *against such misunderstanding* or deductions. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become 'clothed with a public interest,' and therefore subject 'to the control by the public for the common good.' * * *

"We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.' "

In the present case, the business in which trading coupons or certificates are issued is purely private. Its effect stops with the individuals who are concerned in the business transactions in which the coupons or certificates are used. There inheres in it no public use or interest.

State vs. *Dodge, 76 Vt. 197.*

It is lacking in the element of special privilege, and there is no interdependence between the vendees of a common vendor. It does not, therefore, possess that essential feature which was regarded as creative of the power of legislative regulation of insurance rates. It follows, that the statute which we are now considering, must be viewed solely as an attempt, under the guise of the police power, to prohibit a lawful business.

(*s.*) *The Decision in Matter of Gregory.*

Matter of Gregory, 219 U. S. 210, did not, as may be contended by our opponents, involve a decision by this Court as to the validity of such legislation as that now under consideration. Gregory was the managing officer of a trading stamp company conducting business in the District of Columbia. An information was filed in the police court, whereby he was charged with engaging "in the business of a gift-enterprise" in violation of Section 1177 of the Revised Statutes relating to the District of Columbia. He was arraigned in the police court, pleaded not guilty, and the case was submitted to the court upon an agreed statement of facts. He was found guilty and was sentenced to pay a fine. After ineffectual efforts to review the decision by certiorari; he filed an original application here for a writ of *habeas corpus.* Consequently the only question which this Court could determine was, whether the police court had jurisdiction, Mr. Justice Hughes saying:

"A *habeas corpus* proceeding cannot be made to perform the function of a writ of error and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment."

The jurisdiction of the police court was assailed on the ground that the prohibition contained in the statute under which the information was brought was unconstitutional, because violative of the Fifth Amendment. The information rested on the statute, which made it a crime "in any man-

ner'' to engage ''in any gift-enterprise business'' in the District. Mr. Justice Hughes said:

''If this section be read alone no basis appears for the argument of invalidity. It cannot be said that the words 'gift-enterprise business' are so uncertain as to make the prohibition nugatory, or that they necessarily include conduct which lies outside the range of legislative interference in the exercise of the police power. While these words are general, they may be regarded as embracing a class of transactions which the legislature is competent to condemn. Thus a 'gift-enterprise' has been defined to be 'a scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have taken shares in the scheme.' ''

Clearly there was nothing before the Court to indicate the nature of the business which was conducted by the petitioner. Reading the statute, the Court had the right to regard its language in accordance with the definition adopted, and which, therefore, presented a proposition within the jurisdiction of the police court.

It was, however, claimed that this definition was not the correct one, but that Section 1177 of the Revised Statutes should be read in connection with Section 1176, which in turn referred to the act of the Legislative Assembly of the District of Columbia passed in 1871. After considering these provisions, this Court decided that Section 1177 was not controlled by the definition found in the act of 1871, and that the information having been based upon that section, it was founded upon a statute with valid operation, relating as it did to a recognized category of offenses for which it was within the power of Congress to prescribe punishment.

Consequently the police court had jurisdiction. The opinion then proceeds:

"But it is insisted that the facts do not support the conviction. The argument ignores the nature of this proceeding, unless it be meant that no colorable question was presented; that on the agreed statement of facts and viewing the statute as prohibiting transactions involving the element of chance, there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked, and that therefore the court had no jurisdiction to determine whether or not the statute had been violated."

"Such a contention is without merit. It is by no means manifest that the scheme or enterprise in which the petitioner was engaged lay outside the range of judicial consideration under the statute. On the contrary, the agreed statement of facts presented questions requiring the exercise of judicial judgment, and the case falls within the well established rule. Given a valid enactment, the question (assuming it to be one demanding judicial examination) whether a particular case falls within the prohibition is for the determination of the court to which has been confided jurisdiction over the class of offenses to which the statute relates. * * *"

"In hearing this application, this court does not sit to review the correctness of the conclusion of the police court as to the violation of the statute by the petitioner, or of the decision of the Court of Appeals of the District as to the sufficiency of the information filed against him. The question here is not one of guilt or innocence, but simply whether the court below had jurisdiction to try the issues."

Referring to this case, the *Opinion of The Justices, 208 Mass. 607*, made the following comment:

"The recent decision in *Matter of Gregory, 219 U. S. 210,* has no bearing upon the question before us, as the Judge who wrote the opinion was careful to put the decision upon grounds that have no relation to the validity of such provisions as those of this bill."

(*t*) *Other Decisions Relied on by Defendant in Error.*

These are: *Lansburgh* vs. *District of Columbia, 11 App. Cas.,* decided by the District Court of Columbia by a divided court, *512; District of Columbia* vs. *Gregory, 35 App. Cas.* (*D. C.*) *271, State* vs. *Hawkins, 95 Md. 133, Humes* vs. *Ft. Smith, 93 Fed. 857, Fleetwood* vs. *Read, 21 Wash. 547, and Sperry & Hutchinson Co.* vs. *Tacoma, 68 Wash. 254.* It suffices to say that the conclusions reached by the courts in these cases have either been ignored or expressly overruled in the courts of last resort of fifteen states, as well as by the decisions of numerous Federal courts.

In the unanimous opinion of the Justices of the Supreme Court, reported in 208 Mass. 607, rendered on April 16, 1911, after citing in support of their conclusions the following cases: *State* vs. *Shugart, 138 Ala., 86; City Council of Montgomery* vs. *Kelley, 142 Ala., 552; Ex parte McKenna, 126 Cal., 429; Ex parte Drexel and Ex parte Holland, 147 Cal., 763; Denver* vs. *Frueauff, 39 Col., 20; Hewin* vs. *Atlanta, 121 Ga., 723-731; Long* vs. *Md., 74 Md., 565; State* vs. *Sperry & Hutchinson Co., 110 Minn., 378; State* vs. *Ramseyer, 73 N. H. 31; People* v. *Gillson, 109 N. Y., 389; People* vs. *Dyker, 72 App. Div.* (*N. Y.*) *308; People* vs. *Zimmerman, 102 App. Div.,* (*N. Y.*)

103; Winston vs. *Beeson, 135 N. C., 271; State* vs. *Dalton, 22 R. I. 77; State* vs. *Dodge, 76 Vt. 197; Young* vs. *Commonwealth, 101 Va., 853,* and stating that there are numerous similar decisions in the Federal courts and other courts, it was added:

"The Court of Appeals of the District of Columbia in its decisions in Lansburgh *vs.* District of Columbia, 11 App. Cas. (D. C.) 512, and in District of Columbia *vs.* Gregory, 35 App. Cas. (D. C.) 271, stands almost alone, although it has been followed by one or two federal judges in reaching an opposite conclusion."

In *State* vs. *Sperry & Hutchinson Co., 94 Neb. 785,* in concluding its opinion the Court said:

"As opposed to this formidable array of authorities, relator is compelled to rely upon Lansburgh *v.* District of Columbia, *supra;* State *v.* Hawkins, 95 Md. 133; and Humes *v.* City of Ft. Smith, 93 Fed. 875, the last being an opinion by a district judge. As against the last case respondent cites Humes *v.* City of Little Rock, 138 Fed. 929, the opinion being by another district judge in the same state. State *v.* Hawkins, *supra,* is completely destroyed as an authority in this case by State *v.* Caspare, 115 Md. 7, in which case the Maryland court gets squarely in line with the many other States cited and followed by the supreme court of Massachusetts."

In *City and County of Denver* v. *Frueauff, 39 Col. 20,* after citing and reviewing numerous authorities and referring to the case of *Lansburgh* v. *District of Columbia, supra,* the Court said:

"If the decision in that case is to be construed as announcing the doctrine that a legislative dec-

laration that a business, lawful in itself, is a 'gift enterprise,' and is thereby rendered unlawful, regardless of the fact that it wholly lacks the essential element of chance, it is at variance with the uniform current of authority; and if, as we understand it, the conclusion therein reached was because the scheme under consideration was, in the opinion of the court, obnoxious to public morals, or detrimental to the public welfare, we decline to follow it, because it is directly opposed to the conclusion reached as to its character in all the cases in which the business of the trading stamp company has been under investigation."

In *State* vs. *Sperry-Hutchinson Company, 110 Minn. 378,* it was said in the course of its opinion:

"Our attention is called to the language of the Court in the *Lansburgh case,* by which the business of issuing and redeeming trading stamps is condemned as a cunning device which confers no benefit on anybody, and that merchants are persuaded to invest in stamps, partly in the hope of obtaining the customers of other merchants, and partly through fear of losing their own. We assume that the Court was referring to the practice of selling the stamps to one merchant only in the same line of business, thus attempting to give him an advantage over his competitors. *Why this exclusive right to deal in stamps by the merchant who enters into a contract with the company should be considered as detrimental to his, or to the public interest, we are unable to understand, unless the practice is attended with some tendency to deceive.* Many merchants prefer to conduct such scheme of advertising by issuing and redeeming their own coupons. Others prefer to place the entire matter in the hands of a third party and be relieved of the trouble and responsibility. * * * The object no doubt is to secure additional customers, if possible, and build up his trade, and to induce payment in cash for the purpose of getting

the money to use. Merchants who enter into contracts with respondent company agree to make this discount, and presumably they so obligate themselves because they consider it a paying investment. The profit in respondent's business is the difference between the amount received from the merchant for the stamps and the cost of the articles offered in redemption, less the cost of running the business. The profits may be large, but that alone does not furnish ground for the prohibition of the business. No doubt some stamps are lost, some books are not filled out, and hence never presented for redemption. To that extent the Company is the gainer. The same advantage exists when the scheme is conducted by the merchant, but even if there is a distinction in this feature between the merchant and the Company, *it has not been made to appear from the petition that the collectors of stamps pay any additional value for them. They are at liberty to take them, if they so desire, but we discover no element of deception or compulsion.*"

In *Ex Parte Drexel and Ex Parte Holland, 147 Cal. 763,* the Court commented on the decisions relied upon by the defendant in error as follows:

"Respondent's counsel cite a few cases which, they contend go directly to the subject of trading stamps, and support the validity of the Act here in question—notably, State 1. *Hawkins, 95 Md. 146; Humes* v. *City of Cort Smith, 93 Fed. 857;* and *Lansburgh* v. *Dis. of Col., 11 App. Cases, D. C. 512.* With respect to these cases, we do not deem it necessary to consider the suggestion of petitioners that they are distinguishable from the mass of cases above cited; whatever they may hold, they are not of sufficient consequence to ruffle the great current of authority which runs the other way."

In *City Council of Montgomery* v. *Kelly, 142 Ala. 552,* a similar comment was made:

"The only case so far as we have been able to ascertain, in which the courts take a different view of the general subject of trading stamps, are *Lansburgh* v. *Dist Columbia, 11 App. Cases D. C., 512*, which was founded on a statute defining what a gift enterprise is * * * and *Fleetwood* v. *Read* (*S. Ct. of Washington*), *47 L. R. A., 205, see 21 Wash. 547, which is not supported by any authority.*"

In *Sperry & Hutchinson Company* v. *Melton, 71 Southeatsern 19* and *Sperry & Hutchinson Company* v. *Blue, 202 Fed. 82*, involved a license tax which was imposed by a general act applicable to all businesses, occupations and professions. The supreme court of West Virginia held that under the proofs adduced the tax was not prohibitory in amount. The Federal court held that the decision of the State court was a bar to the prosecution of the action in the Federal court, which was all that it was necessary to decide, but it also held that the amount of the tax was not prohibitory under the proofs. The remainder of the opinion consisted of suggestions, not material to the decision of the questions presented.

(*u*) *The Fallacies Indulged by the Court Below.*

That court, in its opinion (reported in *79 Wash. 608; Rec. p. 11*), overlooking the fact that the certificates used by the plaintiff in error were not trading stamps so-called, but certificates issued by his employer, and redeemable by it alone, pointed out three supposititiously possible theories which it was suggested that the legislature may have entertained as reasonably permitting this enactment forbidding the use of trading

stamps in connection with the sale of merchandise, none of which is applicable here.

Waiving for the moment, for the sake of the argument, the inapplicability of these alleged reasons to the present case, we contend that, even as applied to trading stamp companies, they are merely fanciful, and would not warrant the enactment of a prohibitory law. It is urged:

(1) "It might reasonably be supposed or presumed that the legislature believed that the use of these stamps would encourage indiscriminate and unnecessary purchases by people ill able to indulge in any extravagance."

This argument was exploded by Judge Peckham in *People* v. *Gillson, supra,* and is a far-off echo of the despotic statutes of Edward III, which are entirely foreign to our constitutional conceptions of liberty. The same reasoning would prohibit all forms of advertising, would render it criminal to make an attractive display of wares or edibles. and imputes to the general public incapacity to take care of itself, by insisting upon an intolerable exercise of guardianship inconsistent with the most rudimentary conception of liberty. The average adult would on such a theory of legislation be treated like a babe in arms. Legislation based upon that premise could be made universal in its application. The purchase of any article not approved by the Legislature might be prohibited. Our mode of life in its minutest details could be regulated by statute, just as Edward III and his successors sought to control that of the common people. The world would once more be in its infancy, and all mankind in a state of tutelage. But before being consigned to such a

condition, one may well inquire: *Quis custodiet ipsos custodes?*

The same line of reasoning would be a justification of legislation against sales at reduced prices, against purchases of a winter supply of coal or provisions, against the purchase of labor-saving machinery, against the visiting of moving picture theatres. An attempt to exercise such powers, would be more than paternalism—it would be tyranny, pure and simple. How far removed is such a theory from John Stuart Mill's noble conception of liberty! Who would submit to such moral, political and industrial slavery, as that which would be the logical outcome of such reasoning?

Goethe, that profound thinker, in his immortal tragedy "Egmont" caused the tyrannical Duke of Alba to reply to a prayer for liberty, as despots ever have: "'Tis better far to restrain the masses, so that one may treat them as children, and lead them as children, for their own good. Believe me, that the masses do not age, nor attain intelligence; they ever remain childish."

The opinion continues:

(2) "Or suppose that the legislature believed that the use of these stamps was practically forced upon certain merchants without any practical benefit resulting therefrom, and thus they were compelled to pay three and one-half per cent upon their gross sales for the use of the stamps."

That supposition certainly cannot apply in the present case. If to indulge in mere supposition were sufficient, it would be just as well to suppose an exaction of fifty per cent or one hundred per cent, upon the amount of gross sales. What is

there in trading stamps, which forces any merchant to use them *nolens volens,* without any practical benefit to himself? Every merchant is a free moral agent. If in the possession of his natural faculties, he is to be presumed to act in his own interest, and if the use of trading stamps is without any practical benefit to him, he will refrain from using them.

There is and can be no monopoly in trading stamps. If they are deemed advantageous as an instrumentality of business, every merchant can issue his own trading stamps, or he can avail himself of the competition which exists among trading stamp companies. He is not bound to use trading stamps. He can resort to any counter-device that he may desire, to attract business. The fact, however, that his competitors have adopted them for the purpose of securing trade, and that he is unwilling to follow their example, either because he does not believe in their efficacy or is unwilling to enter into a contract with a trading stamp company on its terms, cannot be made the basis for destroying successful competition or for creating legislative crutches for incompetent or unprogressive merchants.

The argument proceeds:

(3) "The legislature might reasonably have believed that the stamp companies, in order to cause the stamps to be used in a certain city, would contract with one merchant for their use, agreeing to pay him a percentage of the sums collected by them from other merchants, and then use the first contract so secured to force other merchants into using the stamps, or suffer loss of trade by failure so to do. In other words, that legitimate business was virtually coerced into paying tribute to the stamp company, a non-producer of wealth or value."

Here, again, no reasonable ground for prohibition is given. Assuming that inducements are held out to one merchant to use stamps, in order to persuade others into using them, that is but another form of making compensation to a business agency, or of paying for services rendered, or of dividing profits derived from a private business. It is practically an adaptation of the typical transaction whereby a producer or wholesaler gives a special discount to a jobber or quantity purchaser. There is nothing in such an arrangement to force another merchant into using the stamps. He is still free to act in accordance with his own desire. The very fact that it is suggested that, by a failure to use the stamps, he might suffer loss of trade, indicates that the use of stamps attracts trade and presumptively results in advantage to the user. To say that legitimate business is thereby coerced into paying tribute to the stamp company, is the equivalent of saying that it is coerced into paying tribute to newspapers, or to any of the other numerous advertising mediums which now constitute recognized instrumentalities of commerce.

To declare that a stamp company, or any other advertising agency which is the medium for the creation of business good-will, is a non-producer of wealth or value, is as unreasonable as to say that the landlord of an attractive business building in a prominent locality, is a non-producer of wealth or value, and may, therefore, be prevented from leasing his building except on conditions which would amount to confiscation of his property.

But even were it a fact that an abuse exists in respect to a sharing by the stamp companies of the income derived by them from certain locali-

ties, with preferred merchants, that would only justify the prevention of the abuse, and not the prohibition of the business method in connection with which it occurs. Otherwise, the discovery of the slightest irregularity in any kind of business, would warrant the destruction of that business. Since all mortals are prone to err, and it is easy for a critic to point out that every kind of business may disclose features which are subject to criticism, it would follow, on the theory urged by the court below, that all business may be prohibited. This is but another version of the unhappy remark that "the only good Indian is a dead Indian."

It is scarcely necessary to repeat, that this argument has no application to the present case, since the United Cigar Stores Company, Inc., the employer of the plaintiff in error, issued and redeemed its own certificates.

At the risk of repetition we may close this part of the argument by calling attention to the fact that this sinister legislation is the result of a persistent and organized effort not of the public, which actually encourages the profit sharing principle underlying the issuance of the coupons or certificates issued by enterprising merchants, but of their competitors in the advertising field or in trade, who desire by means of legislative pressure to build up their own particular forms of advertising or their own trade by destroying the competitive mode of advertising or of trade employed by those whose methods of business appeal to that public which both are equally seeking to attract. This has been pointed out in various of the authorities which we have quoted, *supra, People* vs. *Gillson, People ex rel Madden* vs. *Dycker, People ex rel Appel* vs. *Zimmerman.*

In *ex. Parte Drexel-Holland, 147 Cal. 763,* the Court indicates the source and object of this legislation, and concludes with the warning:

"Its issuance [the coupon] is entirely harmless and within the constitutional right of contract. It may be distasteful to certain competitors in business; but the latter should remember that if a statute suppressing it be upheld, then other oppressive statutes might be enacted unlawfully interfering with and hampering business and the right of contract *to which these competitors would strenuously but vainly object.*"

Appellants' Reply Brief in Tanner vs. Little.

That case being argued with this we may be permitted a few observations concerning our opponents' excursion into the literature of acceleration by means of which they are seeking to justify this legislation. The articles appearing in their Appendix do not come within the class of publications utilized by this Court in *Muller* vs. *Oregon, 208 U. S. 412.* They were all of them official reports by duly constituted authorities of various governments, which related to the public health. Here, however, we have newspaper and magazine articles, which on their face indicate that they are the emanations of paid writers, engaged to carry on a hostile campaign by those who are desirous of breaking down the competion of those who use the trading stamp or profit-sharing coupon to advertise their business. So transparent are these efforts that scarcely a pretext of disinterestedness remains. The virtues of advertising are extolled, yet the trading stamp is termed a lure, as though a word accurately descriptive of all modern business advertisements, sufficed to cast discredit upon a method of business which it is con-

ceded is encouraged by and is popular with the general public.

These articles are purely the work of the imagination—a mass of fabrications. That entitled: "The Fallacy of the Trading Stamp" (Appendix, pp. xvii to xxxvii) is so extravagant and trivial as to be entirely harmless. The publication of Stockton's famous story, "The Fire Screen," would have been fully as useful to point a moral and far more artistic and entertaining. *Mutatis mutandis,* the heroine of the story, might have been induced to embark on a career of improvidence or even worse from a diligent reading of the fascinating weekly announcements of "bargain sales" in the daily newspapers. Her sad fate might have then afforded legislative justification for the suppression of "bargain sales" or even the maintenance by newspapers of their advertising columns. It would lend dignity to that which is a most undignified form of argumentation to dwell further on these articles, which are clearly polemic and inspired (p. x), although they ineffectually seek to conceal that fact.

The arguments which our opponents seek to deduce is that the middleman is unnecessary in business and should, therefore, be abolished. Is it claimed that the Legislature may accomplish a result so contrary to the conception of liberty?

They next claim that in acquiring trading stamps the public is not receiving something for nothing. It has never been pretended that it does. What it receives is something for something. It purchases its daily needs at the ordinary market price and as an inducement and as a partial consideration for its patronage receives other merchandise which has actual value and which the public after a long period of actual, practical ex-

perience and observation continues to desire. In fact, these very articles demonstrate that there is a constant increase in the public demand for premium stamps and what they represent.

In spite of all these carefully prepared articles, our opponents at page 27 of their Reply Brief, when referring to the very kind of transaction for which Pitney stands convicted, says:

"Retailers originally began giving trading stamps to draw trade. The merchant who gave stamps as well as merchandise got patronage from the merchant who did not. It was apparently a form of advertising, and if it cost him little enough to be safely within his cost of doing business, there was no criticism."

II.

The act cannot be sustained as a revenue measure, its purpose being clearly to prohibit the use of an incidental business instrumentality by means of a confiscatory license fee, in evasion of rights secured by the Fourteenth Amendment.

(a) *The act, upon its face, indicates that it is not a revenue measure.*

(1) Its title is silent on that subject. It reads:

"An act relating to the use and furnishing of stamps, coupons, tickets, cards, or other similar device, for or with the sale of goods, wares or merchandise, and providing a penalty for the violation thereof."

(2) It does not assume to tax the business of a trading stamp company, or the occupation of any

merchant. It merely provides that every person who shall use, or who shall furnish to any other person to use, in or with the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, etc., which shall entitle the purchaser receiving the same with such sale of goods, to procure from any person any goods, wares or merchandise, free of charge, or for less than the retail market price thereof, on the production of any number of said stamps, coupons, tickets, certificates, etc., shall, before so furnishing, selling or using the same, obtain a license, in order to obtain which he shall pay to the county treasurer of the county for which the license is sought, the sum of $6,000 for one year.

If a merchant does not use stamps, coupons, tickets, certificates, etc., he is not required to procure a license, or to pay a license fee of any amount whatsoever. If he does use them, then he is required to obtain the license. The amount of the license is not dependent on the volume of business, or on the profits derived therefrom. If a single stamp, coupon, ticket or certificate is used with the sale of any goods, a license must be obtained and $6,000 must be paid, under the penalties imposed for a gross misdemeanor. The license fee is not predicated on the business or occupation, but solely on a method pursued as an incident to a business.

No license fee is required by the act with respect to any other form or method of conducting any other business or any other employment. The act is not a general revenue act. In fact the procuring of revenue from this measure is rendered impossible, by the excessive amount of the license fee, which, as we have already shown, amounts

to more than the gross receipts derived from their businesses by the great majority of merchants who use stamps, coupons, tickets and certificates in connection with their sales. At least it is evident, that such instrumentalities cannot be profitably used if so extraordinary an imposition is levied upon their use.

It is apparent, therefore, that a measure which would yield no revenue, cannot have been intended by the legislature to be a revenue measure, but must of necessity have had for its purpose what the Supreme Court of the State of Washington admitted it to be, the prohibition of the use by and the furnishing of such devices, as are described in the act, to merchants.

If the mere imposition of a license fee by a legislature, may enable it to prohibit any special feature of a business, then it would be easy to circumvent and evade the Fourteenth Amendment to the Constitution of the United States. If a business might still gasp under a license fee of $6,000, the Legislature, for the purpose of utterly destroying it, might increase the license fee to $60,000 annually. This is not an extreme or unwarranted supposition. By House Bill 1643 the Massachusetts Legislature of 1914 passed an act in practically the same terms as that now under consideration except that the amount exacted as a license fee was *$100,000.* It was vetoed by the Governor on constitutional grounds.

If the Legislature were not content with merely prohibiting an incident of a business, however important, by means of a prohibitory license fee, it might go further and destroy by means of such a fee the business itself, however legitimate, to which such incident attaches. Thus a legislature

might tax a railroad to the extent of fifty per cent. of its gross receipts; or a department store to the extent of $100,000 annually; or a manufacturer of ready-made clothing to the extent of $25 for each garment sold; or the owner of an automobile at the rate of $100 per diem. It might evade the decision of this Court in *Smith* v. *Texas, supra,* by imposing a tax of $10 daily upon any person acting as a conductor on a railroad train without having for two years prior thereto worked as a brakeman or conductor of a freight train.

If the Legislature may impose so stupendous a license fee upon the use of profit-sharing coupons as an incident to a legitimate business, then it might impose the same license fee upon one who keeps his business books by double entry, or who conducts his correspondence by the aid of a typewriter, or who engages only male clerks, or who has clerks who are able to speak more than one language, or who uses any form of advertising.

Taking the definition of "liberty," as pronounced in *Allgeyer* v. *Louisiana, supra,* there is not an element in that definition which could not be rendered nugatory by the imposition of a tax beyond the ability of the citizen to meet, with respect to the enjoyment of his faculties, the use of them in a lawful manner, the pursuit of a lawful calling, and the entering into a lawful contract. By taxing excessively one method of business, however lawful, its abandonment might be compelled. Thus a tax of ten per cent. on cash sales, might compel a merchant to sell exclusively on credit, or to go out of business. A tax of a sum equal to that spent upon advertising, would put an end to advertising. A tax of $1,000 an-

nually for every species of article sold by a dry goods merchant or a grocer, would limit him to the sale of a single article or the suspension of his business.

(*b.*) *Even if viewed as possibly a revenue measure, this act would be invalid.*

While the taxing power is necessarily one of the most extensive powers of government, and will not lightly be interfered with by the judiciary, it must nevertheless be true, that it may not be resorted to for the mere purpose of destruction, or be made a pretext for evading constitutional rights secured to the citizen by the Fourteenth Amendment.

The dictum of Chief Justice Marshall in *McCulloch* v. *Maryland, 4 Wheat. 316, 431,* that "the power to tax involves the power to destroy," has been so often quoted, as to become misunderstood. It was certainly not laid down as a principle, that a legislature may, by means of taxation, destroy constitutional rights. It was used in support of the proposition that a State may not tax a Federal instrumentality, because the tax might reach such a point as effectively to destroy that instrumentality and thereby neutralize the powers of the Federal Government. It was but an impressive figure of speech, and not the enunciation of a rule of action. The State may not confiscate private property, whether it be attempted to be done directly or indirectly. Such an act, accomplished through the form of taxation, is as violative of constitutional right, as it would be if undertaken by direct mandate.

It is argued that this Court has practically de-

cided that prohibition, by means of taxation, is defensible, and the decisions in *Veazie Bank* v. *Fenno, 8 Wall., 547* and *McCray* v. *United States, 195 U. S. 61,* are cited in support of that proposition. An examination of those cases, will, however, disclose that they are not authority for it.

The first of them involved a tax on the currency of a State bank. Its validity was attacked on the theory that it was a tax on a franchise granted by the State, which Congress had no authority to collect. It was, however, pointed out that, since Congress had plenary power with respect to the emission of bills of credit, under the exercise of that power it could directly prohibit the issuance of currency by a State bank, and, therefore, could indirectly accomplish the same result. That is evident from the following language of Chief Justice Chase:

"Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect? * * * It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress. The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress. It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here, to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say, that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country. * * *

"Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile."

In the second of these cases, the question arose as to whether the imposition of a tax on oleomargarine artificially colored so as to cause it to look like butter, claimed to be prohibitive, was

valid. That it was not intended by this Court to decide that the taxing power may be employed for the purpose of destruction, and to evade Constitutional inhibitions, is made clear by the following quotation from the opinion of the present Chief Justice:

"4. Lastly we come to consider the argument that, even though as a general rule a tax of the nature of the one in question would be within the power of Congress, in this case the tax should be held not to be within such power, because of its effect. This is based on the contention that, as the tax is so large as to destroy the business of manufacturing oleomargarine artificially colored, to look like butter, it thus deprives the manufacturers of that article of their freedom to engage in a lawful pursuit, and hence, irrespective of the distribution of powers made by the Constitution, the taxing laws are void, because they violate those fundamental rights which it is the duty of every free government to safeguard, and which, therefore, should be held to be embraced by implied though none the less potential guaranties, or in any event to be within the protection of the due process clause of the Fifth Amendment.

"Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. *Moreover, concede for the sake of argument only, that even although a particular exertion of power by Congress was not restrained by any express limitation of the Constitution, if by the perverted exercise of such power so great an abuse was manifested as to destroy fundamental rights which no free government could consistly violate, that it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution by necessary implication forbade them.*

"Such concession, however, is not controlling in this case. This follows when the nature of

oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the States may, in the exertion of their police powers, without violating the due process clause of the Fourteenth Amendment, absolutely prohibit the manufacture of the article. It hence results, that even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the Fifth Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this is follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where to the judicial mind it seems that Congress had in putting such power in motion abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress.

"*Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the courts to say that*

such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; *that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.*"

In *Kirtland* v. *Hotchkiss, 100 U. S. 498,* Mr. Justice Harlan, after recognizing the general powers of taxation residing in government, said:

"It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the Constitution of the United States, this court, as between a State and its citizen, can afford him no relief against State taxation, however unjust, oppressive, or onerous."

As bearing on this subject, attention is called to the valuable opinion of Judge Bellinger in *Ex parte Hutchinson, 137 Fed. Rep. 950,* where it was sought to make it unlawful for any person to sell goods, wares or merchandise by selling trading stamps to merchants for delivery to their customers with purchases, without paying an annual license tax of $200. Dealing with the revenue features of this provision the learned Judge said:

"The authority to raise revenue by a tax levied upon business is undeniable, but it does not admit of argument that the legislature cannot authorize a tax 'for any and all lawful acts, things, or purposes.' It is impossible to imagine a form of government so oppressive as one that would

authorize a tax upon every lawful act or thing a man may do, to say nothing of the authority to tax 'any and all' his lawful 'purposes.' * * * The Supreme Court of Georgia (*Hewin* v. *City of Atlanta, 121 Ga. 731, 49 S. E. Rep. 765*) has decited that the furnishing of trading stamps is not a business. In the concluding part of its opinion [in which Mr. Justice Lamar of this Court concurred] that court says:

'In its ultimate analysis, the use of trading stamps by a merchant is simply a unique and attractive form of advertising, resorted to for the purpose of increasing trade. In the strict commercial sense of the term 'business,' it is not a business at all. It is simply a mode or manner of business—an instrumentality or incident of a business. * * *'

I adopt this view of the effect of the acts for which the petitioner is held. These acts do not constitute a 'business,' in the proper use of that word. They are a mere means of advertising—an incident of a business—'a medium,' as stated in the petition, 'of co-operation and exchange for value.' But whether considered a business or not, the ordinance in question and the charter which authorizes it are in violation of the rights secured by the Fourteenth Amendment to the Constitution of the United States.''

(*c.*) *The statute which we are now considering does not, however, purport to be a revenue law, but is at most merely a license law enacted in the attempted exercise of the police power.*

The theory of a tax is nowhere evident in the statute. This is shown conclusively by its title, and its general structure.

This necessarily makes its validity as a license imposed in the exercise of the police power, depend upon the considerations discussed under Point I. For, if the Fourteenth Amendment stands in the

way of prohibition by means of a direct exercise of the police power, it constitutes no less a bulwark when it is threatened by an insidious, but equally destructive, attack by means of a license fee. Whether death comes by means of a discharge of artillery from the front or the explosion of a mine beneath, is immaterial.

This is well illustrated by the reasoning in *Collins v. New Hampshire, 171 U. S. 30,* where it was held that a statute prohibiting the sale of oleomargarine as a substitute for butter, unless it is of a pink color, was invalid, as being in necessary effect prohibitory. In reaching this conclusion Mr. Justice Peckham used language which, when paraphrased, would be applicable here. He said:

"In a case like this it is entirely plain that if the State has not the power to absolutely prohibit the sale of an article of commerce like oleomargarine in its pure state, it has no power to provide that such article shall be colored, or rather discolored, by adding a foreign substance to it, in the manner described in the statute. Pink is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to this article, which is thereby rendered unsalable, in order that he may be permitted lawfully to sell it. * * * The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed its purpose must be determined by its natural and reasonable effect. (*Henderson* v. *Mayor of New York, 92 U. S. 259; Morgan's S. S. Co.* v. *Louisiana, 118 U. S. 455, 462.*)"

We, therefore, contend that while, in the proper exercise of the police power, a license fee may be exacted from those engaged in any business or occupation, (without now considering the fact that here it is imposed on a mere incident of a business), such fee may not in the case of a business protected by the Fourteenth Amendment be prohibitory.

People v. *Wilson, 249 Ill. 195, 35 L. R. A., N. S., 1074.*
People v. *Steele, 231 Ill. 340, 14 L. R. A., N. S., 361.*
Chicago v. *Netcher, 183 Ill. 104, 48 L. R. A., 261.*
Grand Rapids v. *Brandy, 105 Mich. 670.*
Margolies v. *Atlantic City, 52 Atl. Rep. 367.*
People v. *Jarvis, 19 App. Div. 466.*

In the case last cited, the charter of the village of Norwich empowered the Board of Trustees "to regulate the sale of goods, wares and merchandise by samples or upon order or by contracts by persons not residents of the village of Norwich, and to license such persons to sell such goods, wares and merchandise or take orders, or make contracts for the same and fix the amount to be paid for such licenses." Under this provision an ordinance was adopted fixing the license rates of such vendors at from $5 to $10 per day, and making a violation of the provision a misdemeanor. It was held that this did not authorize the levying upon non-resident dealers of such extreme license fees as substan-

tially to prohibit them from making sales within the village. Mr. Justice Parker said:

"Although denominated a 'license rate,' the charge is made by the day, not ten dollars for every license issued, but ten dollars for every day the business is carried on. A license fee, properly so called, is such a sum as will compensate for the expense of issuing and recording the license, and when the license is issued for the purpose of securing police control over the matter licensed, such further sum as will probably be incurred in inspecting and regulating such business. When such a license may lawfully be issued, such a fee may lawfully be charged; but in the case before us, without regard to the amount fixed, the fact that the charge is made, not for the license issued, but by the day, strongly indicates that the intent was to tax the business and not to obtain compensation merely for licensing the same. But when we consider the amount fixed, such an intent becomes clearly apparent. Ten dollars per day is far beyond any sum which we can fancy would be needed, either to compensate for issuing the license or to meet any additional expense that the inspecting and regulating such a business could possibly create. The article sold is perfectly harmless. The sale of it threatens neither the public health, morals nor safety nor the good order of the community. No provision for public inspection of the same is made by the ordinance, evidently none will be needed. No provision for rejecting any applicant is made. It seems that the license is to be issued to any one who will pay the charges. Plainly the scheme is to raise money for revenue purposes, so far as any licenses are taken out, and to practically prohibit sales being made by non-residents to the advantage of those residing within the village and selling similar articles. * * *

"In the statute before us the language used is 'to regulate' and 'to license.' As we have seen, these words of themselves do not confer the right to tax

or prohibit, and no other words being used the intendment is that regulation merely was the object. As there is nothing in the language, so also there is nothing in the nature of the subject or in the circumstances, that indicates an intent to confer upon the trustees the power to tax the business in question. * * *

"Concede that this statute gives authority to the board of trustees to subject to police regulation the business of selling goods by sample or upon order within the village, it clearly gives them no authority to tax such business or to substantially prohibit it. The scheme which the ordinance in question attempts to carry out is, therefore, not authorized by law."

In *City of Louisville* v. *Pooley, 136 Ky. 286, s. c. 124 S. W. Rep. 315,* it was held that the imposition of a license tax upon the business of lending money on salaries and chattels, which equals eighty per cent. of the average earnings of all persons engaged in such business, is so unreasonable, oppressive and prohibitory as to be void. The license fee in that case was fixed at $1,000 a year. In the course of the opinion the Court said:

"While it is true that the amount of a license fee imposed as a tax is ordinarily a question for the taxing power, and the courts will not interfere with its discretion, yet this court is committed to the doctrine that this rule is subject to the limitation that the tax imposed should not amount to a prohibition of any useful or legitimate occupation. *Hall* v. *Commonwealth, 101 Ky. 382; Fiscal Court* v. *F. & A. Cox Co., 21 L. R. A. (N. S.) 83.* There can be no doubt that the business of loaning money on salaries or chattels is a useful, legitimate occupation. In every community there are many persons who have no personal credit, and, in case of an emergency, they have no means of raising money except by a pledge of their salaries

or chattels. In such cases the company loaning money on salaries or chattels serves a useful, and, oftentimes, a most beneficent purpose. It may be, however, and doubtless is true, that such companies frequently take advantage of the needy circumstances of those desiring to borrow, and exact a rate of interest far in excess of that allowed by law. If this be the case, we take it that such companies should be regulated by statute so as to remedy the evil. The taxing power should not be used to drive them out of existence. Furthermore, we are unable to see how a burdensome tax could in any manner relieve the borrower of oppression. If placed at an unreasonable sum, the effect would be to drive out a number of smaller concerns, and thereby stifle all competition and create a monopoly in the few who are able to pay the tax. In such a case there would be still greater oppression, instead of relief therefrom. Furthermore, the ordinances in question are not confined to those who charge in excess of the legal rate of interest. * * * If a municipality should impose a license tax of $1,000 upon attorneys at law, and this sum was in excess of the net earnings of the majority of the lawyers practicing therein, and as much as eighty per cent. of the average earnings of all the members of the bar, we would have no hesitancy in holding that the amount of the tax was so unreasonable and oppressive as practically to prohibit the practice of such profession. * * * Furthermore, we have examined the license fees imposed upon similar occupations, and find that the license fees in question are so much greater than the former that we conclude it was the purpose of the general counsel to make the license fees in question prohibitive."

To the same effect is *Morton* v. *Macon, 111 Ga. 162, s. c. 50 L. R. A. 485.*

In *People* v. *Wilson, 249 Ill. 195, s. c. 35 L. R. A., N. S., 1074,* it was held that the exacting from itinerant venders of patent or proprietary medi-

cines of a license fee of $100 per month is prohibitive, and, therefore, unconstitutional, as tending to deprive such venders of their liberty and property without due process of law. In the course of the opinion it was said:

"In this State, at the present time, all persons other than an itinerant vender have the right to vend patent or proprietary medicines, and an itinerant vender may obtain that right upon the payment of a monthly license fee of $100. On obtaining a license as such itinerant vender from the State Board of Health, no qualifications other than the payment of such license fee and the receipt of the license are necessary to authorize such itinerant vender to vend such medicines. As a prerequisite to obtaining a license, the statute does not require an itinerant vender to have any knowledge of the patent or proprietary medicine which he is seeking to sell, and after he has obtained a license it does not require of him that he make any analysis, inspection or examination of the medicine he proposes to sell. * * *

"It has often been held that if the legislature, under the guise of regulation, fixes a license fee at so exorbitant an amount as to operate as a prohibition upon the business or calling sought to be regulated * * * the effect would be to deprive the citizen of his liberty and property under the Constitution, and that it would be within the power of the courts to declare such a statute invalid. *Carrollton* v. *Bazzette, 159 Ill. 284, 31 L. R. A. 522; Price* v. *People, 193 Ill. 114, 55 L. R. A. 588; Spiegler* v. *Chicago, 216 Ill. 114, 74 N. E. 718.* While it is no objection to a tax imposed under the police power that it may incidentally yield a revenue, still the tax cannot be made so heavy on a legitimate occupation as to create a monopoly, or, in effect, prohibit the pursuit of the occupation."

The rule against prohibition is supported by the following additional cases, which held void as unreasonable or prohibitory, statutes or ordinances imposing excessive license fees:

In *Ex parte Eaglesfield, 180 Fed. Rep. 558,* one which required itinerant merchants to pay $20 a day;

In *Carrollton* v. *Bazzette, 150 Ill. 284,* a license fee of $10 a day imposed upon itinerant merchants, without reference to the extent of the business or the length of time during which it was carried on;

In *Ottumwa* v. *Zekind, 95 Ohio, 622,* a license fee of $250 per month or $25 per day exacted from transient merchants;

In *Springfield* v. *Jacobs, 101 Mo. App. 339, s. c. 73 S. W. Rep. 1097,* a license fee of $50 a day imposed upon transient dealers in clothing, dry goods and jewelry;

In *Uhrlaub* v. *Cincinnati, 72 Ohio St. 667, s. c. 76 N. E. Rep. 1121,* a license fee of $300 imposed upon transient merchants, regardless of the amount of goods offered for sale or the length of time during which the business was carried on.

To the same effect is *Sipe* v. *Murphy, 49 Ohio St. 536, s. c. 17 L. R. A. 184.*

In *People ex rel. Moskowitz* v. *Jenkins, 202 N. Y. 53,* to which we have referred under Point I, Chief Justice Cullen, treating the statute and the ordinance passed under it, which was there under consideration, as an exercise of the taxing power, although it was apparently never intended as such, regarded the classification there created as plainly arbitrary and unreasonable, saying:

"Transient retailers might be subjected to a reasonable tax, but why a retailer who said his

goods were bankrupt or damaged stock should be taxed $100 in a month, and a transient dealer who refrained from such statement should be taxed nothing, I am at a loss to imagine on any theory of taxation, though as a statute to prevent competition, the reason for the distinction is apparent."

As bearing on this feature of the case, attention is also directed to *Postal Telegraph & Cable Co.* v. *New Hope, 192 U. S. 55,* and *Postal Telegraph & Cable Co.* v. *Taylor, 192 U. S. 64,* although it is appreciated that, in those cases, the conflict was between the Federal power of regulating commerce, and the State power of exercising a police regulation in connection with which a license fee was sought to be imposed. The unreasonableness of the fee sought to be exacted determined the conflict in favor of the controlling Federal constitutional limitation.

The principle laid down in *Oregon Railroad Co.* v. *Fairchild, 224 U. S. 510,* is also applicable, it being there held that, although it was within the power of the Railroad Commission to require railroad companies to make track connections, the question must in each case be determined with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier, the matter of expense being "an important criterion to be taken into view in determining the reasonableness of the order."

Chicago, &c. Ry. v. *Tompkins, 176 U. S. 167, 172.*

Atlantic Coast Line R. R. v. *North Carolina Commission, 206 U. S. 1, 27.*

Missouri Pacific Ry. v. *Kansas, 216 U. S. 262.*

(d) But, independently of the views thus far considered, this legislation deprives merchants who use in their business stamps, coupons, tickets, certificates or similar devices, in connection with their sales, of the equal protection of the law.

They are singled out to pay the onerous license fee, from the entire mass of merchants who are engaged in the same business. Thus a cigar dealer who does not use coupons, is not required to pay the license fee; while one who does, although, as we have sought to show, his business is exactly as legitimate, is arbitrarily subjected to the payment of this oppressive license fee.

On this ground similar statutes and ordinances have been declared unconstitutional, among other decisions being

Ex parte Hutchinson, 137 Fed. 950.
City Council of Montgomery v. *Kelly, 142 Ala. 552.*
Ex parte McKenna, 126 Cal. 429.
O'Keefe v. *Somerville, 190 Mass. 110.*
Commonwealth v. *Gibson, 125 Ky. 440.*
Hewin v. *City of Atlanta, 121 Ga. 731.*
Humes v. *City of Little Rock, 138 Fed. 929.*
City of Winston v. *Beeson, 135 N. C. 271.*
Trading Stamp Co. v. *Memphis, 101 Tenn. 181.*
Sperry & Hutchinson Co. v. *Tacoma, 190 Fed. Rep. 681.*
Little v. *Tanner, 208 Fed. Rep. 605.*
VanDeman & Lewis Co. v. *Rast, 214 Fed. Rep. 827.*

As typical of these cases we refer to *Ex Parte, C. E. McKenna* (*supra*), where the Court considering a similar license tax ordinance, said:

"It is not an ordinance to prohibit an immoral practice or to regulate a hazardous or offensive business, or the conduct of a lawful game or public exhibition. *It is, under the guise of a revenue measure, an evident attempt to put an end to the issue and redemption of trading stamps by levying a discriminating and prohibitory tax upon those dealers who resort to that method of attracting customers.*" * * *

"*The persons to whom it applies pay the same rents and local taxes as other merchants, and it is not perceived how the issue of trading stamps makes theirs an essentially different business or furnishes any justification for a discrimination ordinance. It is not necessary, therefore, to overrule or in any respect depart from the doctrine of the Haskill case in order to pronounce the ordinance here in question invalid. Accepting the principle above quoted from the opinion in that case, there is lacking a ground of discrimination which was their ground to be sufficient to support the ordinance. Besides, there is no hard and fast line which divides reasonable from the unreasonable in such matters where the question is in doubt, as in the Chico case the ordinance will be upheld, but there may be such a palpable discrimination that there can be no doubt.* We think this case furnished an instance. To tax the smallest retail establishment eight times as much as the largest mercantile business, *merely on account of its method of advertising, or attracting customers, is clearly unreasonable.*

In support of this conclusion we also cite the admirable opinion of Judge Vann in *People ex rel. Farrington* v. *Mensching, 187 N. Y. 8.* There it was held that a law imposing a tax on the sale

and transfer of shares of stock at a specific rate per share, instead of upon its real or nominal value, did not constitute a justifiable classification, the result of the statute being that the sale of 100 shares of stock of the face value of $10 was taxed $2, while a sale of 10 shares of the value of $100 was taxed twenty cents. He said:

"While the legislature has wide latitude in classification, its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim or caprice. There must be some support of taste, policy, difference of situation, or the like; some reason for it, even if it is a poor one. While the State can tax some occupations and omit others, can it tax only such members of a calling as have blue eyes or black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others, or tax the sale of certificates printed on white paper, and not those on yellow or brown. While one class may be made of horses and another of sheep, or even a class made of race horses, owing to the use made of them, without a shock to common sense, a classification limited to white horses would be so arbitrary as to amount to tyranny, because there would be no semblance of reason for it. A reason might be advanced, although specious and unsound, for taxing Holstein bulls and no others, but could even a sophist argue in favor of taxing Holstein steers and no others, since they are incapable of reproduction? A classification of dealers in cigarettes into those selling at wholesale without the State and those selling at retail within the State, was sustained on the ground that the two occupations are distinct (*Cook* v. *Marshall County*, *196 U. S. 261*), but could dealers in any commodity be classified according to age, size and complexion? A classi-

fication of sales into those made in an exchange and those made elsewhere was sustained in another case, but could exchanges be so classified as to tax only such sales as are made in those carried on in brick buildings? *Nicol* v. *Ames, 173 U. S. 509.* Perhaps an answer to these questions may be found in *Cotting* v. *Kansas City Stockyard Co., 183 U. S. 79,* where a general act, the effect of which was to so classify stockyards in the State of Kansas as to discriminate against the largest stockyard in the State, but without mentioning it by name, was held to be unconstitutional because it denied to that company the equal protection of the laws. A similar fate met an act of another State, which provided that a certain tax should be imposed only upon those taxable inhabitants of a school district who had not paid a tax assessment in the year 1871. (*State ex rel. Trustees* v. *Township, 36 N. J. Law, 66.*) Even if a tax on farms according to acreage might be sustained, it is evident that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon farm than upon another of the same size, situation and value. A statute imposing such a tax would not give 'that equal protection and security' to which all, under like circumstances, are entitled 'in the enjoyment of their personal and civil rights.'

"By the statute before us the tax is laid upon sales, and the class of sales taxed consists of corporate shares, but all members of the class are not treated alike, since one is taxed many times as much as another, although worth no more. Two corporations may be doing the same kind of business upon the same amount of capital, with assets of the same value, and shares aggregating the same face value, but if a share in one has but half the face value of a share in the other, still the sale of the same number of shares in each would be taxed the same amount, in manifest dis-

regard of justice and principle. The same person may own one-tenth of all the shares of both, yet on the sale of all his stock in both, his tax on the one would be twice that upon the other, although his proportionate ownership of the property of the corporation would be the same in each."

See also *People ex rel. Moskowitz* vs. *Jenkins, 202 N. Y. 53.*

In *O'Keeffe* v. *Somerville, 190 Mass. 110,* the Court was called upon to consider a statute entitled "An Act to impose an excise tax on the business of selling, giving or delivering trading stamps, checks, coupons or similar devices, in connection with the sale of articles." The first section read as follows:

"Every person, firm or corporation selling, giving or delivering trading stamps, checks, coupons or similar devices, in connection with the sale of articles, entitling the holders to receive articles other than the articles so sold, shall pay an excise tax for carrying on such business, equivalent to 3 per cent. of the gross receipts, by such person, firm or corporation, from the sale of the articles so sold and from the trading stamps, checks, coupons or similar devices sold, given or delivered in connection therewith."

After considering the provisions of the Massachusetts Constitution with regard to taxation, Chief Justice Knowlton said:

"In the statute before us the selling or giving of trading stamps, in connection with the sale of articles can hardly be considered a business in itself; but the business which the statute seeks to reach is the selling of articles under an arrangement to deliver stamps as a part of the sale, or as an accompaniment of it. The statute includes

sales of articles of every kind, and describes the delivery of stamps in terms that include deliveries which, under the decisions of this court, are entirely unobjectionable in law. *Commonwealth* v. *Sisson, 178 Mass. 578, 60 N. E. 385; Commonwealth* v. *Emerson, 165 Mass. 146, 42 N. E. 559.* Such deliveries have generally been considered permissible in connection with the sale of articles, in the exercise of a common right, and many cases have been decided which invalidate statutes or ordinances intended to prevent such deliveries. * * *

"Even if the legislature might constitutionally impose an excise tax upon the business of selling articles in the usual way, it has not attempted to do so, and this statute, if it were construed in reference to the general business of selling alone, *would be unreasonable and unconstitutional, because it would impose a tax upon some vendors and not upon others.* We are therefore brought to the question whether the peculiar way of selling, to which the statute relates, involves a material difference in the nature of the business, such as to warrant the imposition of an excise tax on that account. The only difference referred to is the giving or delivering, as a part of the sale or in connection with it, of a stamp, or other similar device, which represents an additional right of property. Because this is entirely legitimate (see cases above cited) the attempt to tax it, as a peculiar kind of sale, is 'a discrimination founded upon an immaterial fact,' which renders such a statute invalid. *Minot* v. *Winthrop, 162 Mass. 133-122, 83 N. E. 512, 26 L. R. A. 259.* Taking the acts referred to in the broad words of the description in the statute, they are not dependent for their legality upon the legislative will, nor do they call for legislative regulation. They are performed in the exercise of a natural right, and are not in any sense rights or privileges conferred by law. If these stamps were used in such a way as to constitute a lottery or game of chance, the use would be punishable. But this statute purports to deal

with such methods of sale as appeared in *Com.* v. *Sisson, 178 Mass. 578, 60 N. E. 385,* and in other cases above cited."

Smith v. Texas, 233 U. S. 630, is a direct authority on the subject of arbitrary classification, as are the decisions in *G. C. & S. F. Ry. Co.* v. *Ellis, 165 U. S. 150, Cotting* v. *Kansas City Stock Yards, 183 U. S. 79* and *Connolly* v. *Union Pipe Co., 184 U. S. 549.*

It would be useless to attempt an analysis of the numerous decisions of this Court in which classifications have been sustained as not violative of the equal protection of the laws. Doubtless every case is to be determined upon its own peculiar circumstances. It may be said, however, with entire safety, that where it appears that there is an attempt at arbitrary selection and unreasonable discrimination, a legislative classification embodying those elements violates the Constitution.

The statute with which we are now dealing, is evidently concerned with the elimination of the use of stamps, coupons, tickets and certificates in the sale of goods. To bring about such elimination by direct provision of law, would, as we have sought to show, impinge upon the liberty of the citizen. To single out for destruction or for the payment of an oppressive license fee, from the entire body of the merchants of the State of Washington, those who, in the exercise of their constitutional right, make use of such instrumentalities as an incident of their business, is arbitrary selection. Two men may conduct cigar stores, or groceries, or apothecary shops, on the same block. One may do a large business and the other a small business. The latter, in order to increase his trade, may offer a gift to his customers. Because

he chooses to do this, he is required to pay a license fee of $6,000; whilst his more flourishing neighbor, engaged in exactly the same business but on a larger scale, who does not find it necessary to resort to such a medium for securing trade, is absolved from the obligation to pay a license fee. The smaller dealer, who is seeking to compete with the other, is penalized for his enterprise. The larger dealer, who is interested in the suppression of competition, becomes the beneficiary of such classification.

To further point out the discriminatory character of such a license fee, it is to be remembered that, under this law, the quality of the merchandise sold by him who is subjected to the license fee, may be better and the price less, than that of his neighbor who is exempted from the obligation to take out a license. The former may be contented with small profits, and be willing to share his profits with his customers, with the expectation of retaining their patronage, and through their approval to extend it to others. Yet the iron hand of the legislature, by means of its arbitrary classification, affords to the less enterprising and less liberal merchant a point of vantage. Moreover, this legislation undertakes to classify, not on the basis of a substantial difference in the business conducted by the two individuals instanced, but because of an incidental method employed by one and not by the other.

While it may be conceded that the courts will not reject a legislative classification merely because it is unwise, or impolitic, it must nevertheless conform to the rule of reason, otherwise it cannot be maintained. Is it reasonable to put into one class, to be subjected to a heavy license fee,

merchants who advertise, who seek to attract custom by legitimate methods, who are industrious, who give to their customers special advantages in the form of discounts or participation in profits, and to put into another class, to be subjected to no license fee whatsoever, those who do not? Would it be reasonable to classify, for the purposes of a license fee, merchants who are under forty years of age, or who weigh more than one hundred and fifty pounds, or who sell for cash only, or who are naturalized citizens rather than native-born?

III.

The judgment of the Supreme Court of Washington should be reversed and the plaintiff in error discharged.

Louis Marshall,
Sol. M. Stroock,
Counsel for Plaintiff in Error.

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In the Supreme Court of the United States

OCTOBER TERM, 1915.

No. 242

F. S. PITNEY, *Plaintiff in Error,*

against

THE STATE OF WASHINGTON, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF DEFENDANT IN ERROR.

W. V. TANNER,
Attorney General.
ALFRED H. LUNDIN,
Prosecuting Attorney
King County.
DALLAS V. HALVERSTADT,
Counsel for Defendant in Error.

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BRIEF OF DEFENDANT IN ERROR.

On page 11 of the brief of plaintiff in error it is stated that the Supreme Court of the State of Washington frankly admitted that the license fee fixed by the act is prohibitory. Counsel is in error. What the Supreme Court actually said is the following:

> "That provision of the state constitution which prohibits excessive fines need not be further noticed. For the purposes of this opinion, *it will be assumed* that the fee of $6,000 which the act provides for is prohibitory. In other words, the act will be considered

> though it prohibited the use of trading stamps. This assumption also makes it unnecessary to determine whether the court may inquire into the amount of the tax, when the right to tax is once established, and determine whether it is prohibitive. (Italics ours.)

Counsel argue that, if this act be upheld, many extreme acts may be passed by the legislature, and that thereby constitutional liberty will become a myth and that, therefore, the act should be held void. This suggestion may well be answered in the words of Mr. Justice Holmes, speaking for the court, in the case of *Noble State Bank vs. Haskell*, 219 U. S. 104, 112, where, answering similar argument, he said:

> "It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise."

Again, counsel urge that there are other practices which work quite as much detriment as the trading stamp and coupon, and because of that fact, the trading stamp and coupon has been unlawfully singled out by special legislation. It must not be forgotten that the legislature has power to recognize degrees of evil, and that, although evils may logically be similar, if, in the judgment of the

legislature, the one noticed by it is such as warrants legislative action, and the other not, the act is not invalid because not all inclusive. This act is not invalid because it does not cover the entire range of possible evils. If it hits the evil where it has been found by experience most prevalent, that is sufficient.

Carroll vs. Greenwich Ins. Co., 199 U. S. 401.
Keokee Coke Co. vs. Taylor, 234 U. S. 224.
Ozan Lumber Co. vs. Union County National Bank, 207 U. S. 251.
Heath & Milligan Mfg. Co. vs. Worst, 207 U. S. 351, 356.
Miller vs. Wilson, 236 U. S. 373, 383.

In the case of *Miller vs. Wilson, supra*, 236 U. S. 373, 383, answering precisely the same argument, this court said:

> "The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. *Patsone vs. Pennsylvania*, 232 U. S. 138, 144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibi-

> tion 'should be couched in all-embracing terms.' *Carroll vs. Greenwich Ins. Co.*, 199 U. S. 401, 26 Sup. Ct. Rep. 66. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Consol. Coke Co. vs. Taylor*, 234 U. S. 224, 227, 34 Sup. Ct. Rep. 856."

It is further argued that if the power of the legislature to pass the act in question be affirmed, then there is no limit to the abuse of that power which may result. The possibility of abuse of power does not affect existing power.

Powell vs. Pennsylvania, 127 U. S. 678, 685.

People vs. Gillson, 109 N. Y. 389, is chiefly relied on by the plaintiff in error for a reversal of this judgment. It is naturally with the greatest reluctance that counsel find it necessary, in presenting their views of the question, to point out what they believe are fundamental errors in the opinion written by that great judge, but it is believed that the argument used in that opinion is not in harmony with that adopted by this court on questions of police power. In the quotation therefrom (brief p. 26) appears the following:

> "A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited and perhaps weakened or destroyed by such legislation."

It is believed that the decisions of this court are all to the effect that whether a pursuit is followed "in a manner not injurious to the community," is primarily a question for the legislature to determine, and upon which its judgment is conclusive unless it is so clearly mistaken as to leave no room for doubt, or unless its action is so arbitrarily and so unnecessarily destructive as to be within the limited number of cases in which this court may pronounce the legislature clearly wrong. The learned judge in the *Gillson* case proceeded to consider the method in which the business in question was carried on, and concluded that there could be no harm resulting therefrom sufficient to justify an exercise of the police power. We submit that if the learned judge had applied the rule which this court in similar cases applies, i. e., if a reasonable mind can conceive of reasons for an act, it must be sustained, a different conclusion would have been announced in that case. His conclusion, however, was as follows:

> "I lay no stress whatever upon the argument that this kind of transaction naturally induces people to purchase more than they want of any article of food, in order to get the other article with it which comes to them in the nature of a gift, and thus the poorer people are led to extravagance in outlay."

It is not perceived what machinery was adopted by the court in making such an investigation of that case as would enable the court to determine the fact thus announced. It is believed that the court announced a conclusion on a question calling for legislative not judicial judgment, particularly when it is remembered that the question before the court was one of power, not policy.

The learned judge further stated:

> "The reasoning of counsel for the People is based upon the theory that no one will sell, as a matter of permanent business, an article at a price below what it cost him to procure it; and, if he sell his coffee (in this instance), as low as the price thereof with other dealers, when he adds a gift at the time of the sale, he thereby reduces his profits below that of his competitor; and, in order to prevent such a loss, he will necessarily and inevitably sell an inferior or adulterated article."

When it is borne in mind that close competition drove so many manufacturers and dealers to adulteration of food products, for the purpose of greater gain, to such an extent as made necessary the passage of the Act of Congress known as the "Pure Food and Drug Act," it is not believed that the argument summarily disposed of by the learned judge was without foundation. It is particularly true when we recall the fact, of common knowledge,

that an increased cost price to the dealer inevitably results in an increased selling price which, if prevented by keen competition, must necessarily result in the substitution of an article of inferior quality for that of superior quality. We submit that the learned judge entered the domain of legislative policy when the only question before the court was legislative power.

If, however, we are mistaken in the views thus expressed, it nevertheless follows that, even though in the *Gillson* case the evil aimed at had not attained proportions sufficient to call for legislative action, degrees of evil justifying legislative action during the intervening years,—the trading stamp and coupon business having assumed the enormous proportions which it has now attained,—may very properly be regulated or prohibited as the judgment of the legislature may dictate. Clearly the judgment of the legislature on the degree of evil justifying legislative action is conclusive, the only question for judicial opinion being that of power.

The views of the plaintiff in error as to the extent and efficacy of the police power seem to be in complete harmony with those held by the courts of New York on that power. This conclusion necessarily follows because of the great number of cases

from that state cited in the brief. We shall not discuss them *seriatum*, but merely call attention to the limitations placed by that court upon the police power and compare them with those fixed by this court.

In the case of *In re Jacobs*, 99 N. Y. 98, the court held unconstitutional, because it arbitrarily interfered with personal liberty and private property without due process of law, an act which prohibited the manufacture of cigars or preparation of tobacco in any form on any floor or part thereof in any tenement house, if such floor or any part thereof was used by any person occupying it as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein. This court, on the other hand, in the case of *Austin vs. Tennessee*, 179 U. S. 343, held that the manufacture of cigarettes could be wholly prohibited. It is difficult to believe that the police power is not sufficient to prevent the manufacture or preparation of tobacco in living quarters, when we remember the noisome odors naturally arising therefrom, which, if confined, become a source of danger to health.

In the case of *People vs. Marx*, 99 N. Y. 377, the court held unconstitutional an act of the legis-

lature prohibiting the manufacture out of any oleaginous substance, or any compound of the same other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk or cream of the same, or the selling or offering for sale the same as an article of food. This court reached exactly the opposite conclusion in *Powell vs. Pennsylvania*, 127 U. S. 578, *McCray vs. United States*, 195 U. S. 27, and *Hammond Packing Co. vs. Montana*, 233 U. S. 331.

In the case of *People vs. Orange County Road Construction Co.*, 175 N. Y. 84, the court held unconstitutional an act limiting hours of labor on public work, and based its decision on the due process clause of the Constitution. This court reached a contrary conclusion in the case of *Atkin vs. Kansas*, 191 U. S. 207.

In the case of *People ex rel. McPike vs. Van De Carr*, 178 N. Y. 425, the court reached the conclusion that the legislature could not prohibit the use of pictures of the national flag for advertising purposes, so far as concerned property in existence at the time the act took effect. This court held a similar act valid in *Halter vs. Nebraska*, 205 U. S.

34, placing its decision on the ground, among others, that such use tended to degrade the flag in public estimation and to lessen patriotic respect for it.

In the case of *Wright vs. Hart,* 182 N. Y. 330, the court held that an act providing that a sale of any portion of a stock of merchandise other than in the ordinary course of trade in the regular and usual prosecution of the vendor's business, or the sale of an entire stock of merchandise in bulk, should be fraudulent as against the creditors of the vendor unless, at least five days before selling, a full and detailed inventory be made and the vendee makes explicit inquiry of the vendor as to the names of creditors, and notifies them, etc., violated the equal protection and due process clauses of the 14th Amendment. This court reached a contrary conclusion in the case of *Lemieux vs. Young,* 211 U. S. 489, and *Kidd D. & P. Co. vs. Musselman,* 217 U. S. 461. It is worthy of note that the opinion of Judge Werner in the *Wright* case is adverted to and quoted from in support of the argument against the act here questioned. It may be suggested, in passing, that the argument used in reaching a conclusion contrary to that reached and affirmed by this court, cannot be persuasive.

In the case of *People vs. Warden,* 157 N. Y. 116, the court held that the sale of a valid passenger ticket by a broker was not a fraud on either the transportation company or the traveler calling for protective legislation in the exercise of the police power as attempted by an act of New York. Of course, it is fundamental that a railroad company may make its ticket non-transferable. It seems difficult of belief that the legislature is without power to prohibit ticket scalping in fraud of the terms upon which the contract of transportation was sold by the railroad company.

In the case of *Frank L. Fisher Co. vs. Woods,* 187 N. Y. 90, the court held unconstitutional an act making it a misdemeanor for any person to offer for sale any real estate, without the written authority of the owner, or his attorney, or of the person who made a written contract for the purchase of the property with the owner, upon the ground that it deprived citizens of rights and privileges secured by the 14th Amendment, of liberty and property without due process of law and of the equal protection of the law. It is not easy to understand the theory upon which that conclusion can be sustained when it is remembered that the prevention of fraud is one of primary import in the police power.

In the case of *People vs. Williams,* 189 N. Y. 131, the court held unconstitutional an act forbidding the employment of minors under eighteen and females in factories between 9 P. M. and 6 A. M., on the ground that it infringed the right of contract. Eliminating wholly from consideration minors mentioned in the statute, which alone it is believed justified the act, and considering only the fact that it prohibited females from working during the hours which should be devoted to sleep, it is not believed that this decision accords with that of this court in *Muller vs. Oregon,* 208 U. S. 412, where this court held that the hours in which females might work can constitutionally be limited.

In the case of *People ex rel. Duryea vs. Wilber,* 198 N. Y. 1, the court held unconstitutional an act of the legislature requiring a license for the operation of a dancing academy where dancing was taught, but not for the conduct of a public dance hall where dancing was indulged in but not taught, on the ground that it unreasonably discriminated between these two classes. The mere fact that children of very tender years might very likely be entrusted to persons teaching dancing, is sufficient constitutionally to distinguish that class from those operating a public dance hall.

The *Gillson* case is cited as authority for the conclusions reached in some of the above cases. This shows clearly the estimate of that great court of the results necessarily following the *Gillson* decision.

The plaintiff in error calls attention to the three Massachusetts cases which he claims are conclusive. The first is *Commonwealth vs. Emerson*, 165 Mass. 146, in which Mr. Justice Holmes, then a member of that court, held that the act in question did not purport to forbid a sale of two things at once, even if one of them was the principal object of desire and the other an additional inducement which turned the scale. In other words, the decision was not on the constitutionality of the statute, but upon its construction.

In the case of *Commonwealth vs. Sisson*, 178 Mass. 578, Mr. Justice Holmes again construed an act of the legislature of that state, and in so doing called attention to his former decision, saying that it must be presumed that the legislature knew of the construction of the earlier act and adopted it when passing the later one, that the later act prohibited the giving of coupons only to the same extent that the earlier act prohibited the giving of goods, and concluded that the latter act, thus lim-

ited, it was unnecessary to construe trading stamp decisions.

In the case of *O'Keefe vs. Somerville,* 190 Mass. 110, the question in the case was whether an act requiring the payment of an excise tax of three per cent of the gross receipts resulting from the selling, giving or delivering of trading stamps, checks, coupons, or similar device in connection with the sale of articles was within the constitutional provision authorizing the legislature to "impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, purchased, manufactured, or being within the state." The decision was of the question whether the business taxed was included in the word "commodities." The court held that it was not; and anything further said in the opinion is, we submit with the greatest respect to that court, *dictum.*

On page 59 of the brief it is stated that it is yet to be shown that any of the parties contracting to use trading stamps or coupons have indicated a desire for the abolition of this kind of business. In the case of *Denver vs. Freauff,* 39 Colo. 20, there was introduced in evidence, and quoted by the court in its opinion, a copy of the

contract used by the Sperry & Hutchinson Co., the pioneer in the trading stamp business, in which it appears that the person using the stamps was bound by his agreement "not to join in any combination of merchants for the purpose of discontinuing the use of said company's trading stamps."

On page 73 *et seq.* of the brief counsel denominate the reasons suggested by the lower court as justifying the act mere fallacies. Among the reasons suggested was one that the use of the stamps would encourage indiscriminate and unnecessary purchases by people illy able to indulge in any extravagance. On page 79 of the brief very severe criticism is made of the articles referred to and attached to the brief of the appellant in the case of *Little vs. Tanner*, argued and submitted herewith. It is there charged that those articles are the emanations of paid writers engaged to carry on a hostile campaign by those desirous of prohibiting the trading stamp and coupon business. It had never occurred to us in our liveliest imagination that eminent economists, such as Messrs. Rubinow and Patterson, held ideas the subject of barter and sale, nor that the columns of such publications as the Journal of Political Economy and the American Academy of Political and Social Science, could be

purchased as goods over the counter. If the court cares to read the articles, it will be observed that none of them are at all one-sided, but that arguments against us appear in them.

But, laying these articles aside, it occurs to us that admissions made by Mr. Stroock, who appears on this brief, made at a time when he was opposing legislation against the coupon interests, are not likely to be unduly favorable to his opponents. In a pamphlet published by the Government Printing Office in 1914, entitled, "Tax on Tobacco Coupons," there appears all of the testimony and arguments made before the Ways and Means Committeee of the Second Session of the 63d Congress, for and against bills then before that Committee, placing a tax on coupons sold or given away with tobacco and tobacco products. Mr. Stroock appeared on behalf of the United Cigar Stores Company (page 26). We quote from questions put to him and answers made by him, as follows:

> "MR. MOORE: Getting away from your legal, constitutional questions, what would be the practical effect upon your business and allied interests if the coupon business should be discontinued?
>
> "MR. STROOCK: We would find some new way of advertising our business, I suppose. So far as the manufacturers are concerned who

sell us goods. I think experience has shown that they would simply sell that much less in goods; in other words, the goods they market through our premium department go to a class of people who would not otherwise buy those goods. Experience has shown that. I say experience has shown it, because there have been some classes of trade that have adopted a coupon system and dropped it; and then, after they dropped it, that line of goods which they had been handling had fallen off almost completely" (page 41).

"MR. MOORE: Would you sell less cigars if the coupon practice were discontinued?

"MR. STROOCK: I hope we would not.

"MR. MOORE: But would you? I understand you oppose the bill.

"MR. STROOCK: I think it would affect us.

"MR. MOORE: Some of us are not lawyers, and are not so much interested in the constitutional feature of this as we are in what would be the practical effect.

"MR. STROOCK: I think it would diminish the consumption of tobacco.(?)

"MR. MOORE: You think it would diminish the consumption of tobacco?

"MR. STROOCK: I think it would; yes.

"MR. MOORE: Would it affect the manufacture of articles that enter into the coupon system?

"MR. STROOCK: I think that trade would be cut off almost entirely. In other words, experience has shown that the goods we market through the premium business are goods which

reach a class of consumers that otherwise would not buy them." (Page 42.)

"MR. GARDNER: If we pass this law, at what price would you sell that package of cigarettes?

"MR. STROOCK: In all probability at the same price. When you make standard goods you have a fixed price.

"MR. GARDNER: Then, if you are correct in that, you would have gained 1 cent on every five packages of cigarettes sold at 5 cents each?

"MR. STROOCK: If we sold as many as we did before.

"MR. GARDNER: Therefore, you must anticipate a diminished sale, or you would not oppose this bill?

"MR. STROOCK: I said that; that I do anticipate highly diminished consumption." (Page 43.)

"THE CHAIRMAN: You say if this bill were passed you would not sell as many cigarettes or as much tobacco. Do you mean the sale of tobacco would fall off entirely, or that part of your sales would go to the independents?

"MR. STROOCK: I am serious about that, Mr. Chairman. I think the consumption of tobacco itself would fall off. I do not believe it would be diverted." (Page 44.)

"THE CHAIRMAN: Do you think there would be any serious injury to the whole tobacco business, taking it as a whole, if this entire system of gifts and coupons were abolished?

> "MR. STROOCK: I think it would be an injury to the tobacco business in the sense that I really believe that the consumption of tobacco would be diminished. I believe the consumption of any article is diminished by the withdrawal of the advertising or inducement for its purchase. If you withdraw that advertisement or inducement for the purchase of tobacco, the amount of its consumption would be diminished." (Page 44.)

The court will observe that Mr. Stroock was very explicit in his statement that the discontinuance of the coupon business would result in a diminished consumption of tobacco and tobacco products, and equally so in his statement that the goods which were out put through the premium business were goods "*which reached a class of consumers that otherwise would not buy them.*" Those admissions, being made as late as March 11, 1914, are significant in view of the fact that they show, as actually existing, facts which the learned judge in the *Gillson* case did not believe to be facts. We submit, therefore, when the Supreme Court of the State of Washington concluded that the legislature might reasonably have believed that the trading stamp and coupon business resulted in extravagent purchases, its view was not at all out of harmony with the admissions made by Mr. Stroock at a time when he was appearing on behalf of the coupon interests. The further fact that in his

missions so made he stated that the consumption of tobacco generally would be decreased, conclusively shows one or the other of two things, either of which is sufficient to sustain this act, i. e., that extravagant or unnecessary purchases were being made because of the coupon, or that the coupon was a lure by which tobacco was sold in quantities without which it could not be sold.

It is suggested, however, that, even though it be true that merchants are driven to the use of trading stamps because of the very favorable contract given to one merchant in a town for the purpose of driving the other merchants to their use, it does not apply to the coupon in this case. It is quite evident, however, that the use of coupons with articles acting as a lure, as they admittedly do, makes it possible for the manufacturer and the retailer to dispose of inferior articles as substitutes for superior articles to the extent that the coupon acts as a lure. It is needless to point out that the manufacturer, knowing the lure of the coupon, will, by reason of human avarice, increase the attractiveness of the lure, and, as a necessary consequence, will thereby market an article of inferior quality for an article of superior quality. It is not an answer to say that the competition must be in the matter of excellence of the rival

articles. If competition were such, it would be true competition. The act aims at the practice of making the competition a matter of lure, and seeks to prevent competition being other than on the basis of the grade of the articles offered for sale. If, therefore, the legislature believed that the coupon given with the goods of the plaintiff in error, or the coupons packed by manufacturers in package articles enables the parties to substitute inferior articles for articles of superior quality, and that that practice prevailed, a sufficient reason appears to justify the passage of the act.

On October 4, 1915, the United States District Court for the District of Oregon, in the case of *Cottrell vs. The Sperry & Hutchinson Co. et al.*, held unconstitutional the Oregon trading stamp act passed in 1915, by the terms of which an excise tax of five per cent annually was levied on the gross receipts of every person, firm or corporation who shall use, or who shall furnish to any other person, firm or corporation for use in connection with the sale of any goods, wares or merchandise, any stamps, coupons or tickets commonly known as trading stamps. This decision is not yet reported. The court merely held that the amount of the tax was prohibitive, and stated, without comment, that

the case was ruled by *Tanner vs. Little*, submitted herewith. A very clear distinction between that case and the case at bar appears in the fact that in this case the tax is levied upon the business at which the act is directed, while in the Oregon case the tax is levied upon any business in connection with which trading stamps or coupons may be used. That case, together with the case of *Little vs. Tanner* and *Wiseman vs. Tanner*, 221 Fed. 694, presents a curious state of affairs. Each of them involved the constitutionality of a state statute, and each was heard by a court of three judges pursuant to the judicial code, Judge Gilbert, Circuit Judge, presiding in each case. The court will observe that, in *Little vs. Tanner*, the court called attention to the fact that the license fee was prohibitive, and then found that the trading stamp and coupon business was legal, and held that it could not be prohibited. They further held that an earlier decision of the State of Washington to the effect that an act making an offense to handle coupons and trading stamps violated the State Constitution, was binding on that court. In *Wiseman vs. Tanner* the complainants sought to enjoin the enforcement of an initiative prohibiting employment agents from accepting, directly or indirectly, any fee, remuneration, or reward of any kind for securing an appli-

cant employment or furnishing him information leading thereto. The equal protection and due process clauses of the State and Federal Constitutions were set up and specially relied on in the bill. The state court had theretofore held, in *Spokane vs. Macho,* 51 Wash. 322, as follows:

> "It cannot be denied that the business of the employment agent is a legitimate business, as much so as is that of the banker, broker, or merchant; and, under the methods prevailing in the modern business world, it may be said to be a necessary adjunct in the prosecution of business enterprises."

The court upheld the initiative, and, in distinguishing *Tanner vs. Little,* said that it was decided on local law. Then followed the decision in the *Cottrell* case, in which the court held the action ruled by *Tanner vs. Little.* It is not believed that these decisions can be harmonized, and the fact, if the belief is correct, that they cannot be harmonized, is one of significance.

The contention is kept foremost, by frequent repetition, that a lawful practice cannot be made unlawful, that a lawful article cannot be made unlawful. In the case of *Lawton vs. Steele,* 152 U. S. 133, 143, this court said:

> "The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (*People vs. We*

> 106 N. Y. 293, 60 Am. Rep. 452); and, in such case, the legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance."

The fallacy of the argument is illustrated in this: At common law a man might embezzle until a statute cut down his liberty so to do. It would have been remarkable had the argument been urged on the question of the constitutionality of the first statute making embezzlement a crime, that embezzlement was not unlawful at common law, and was, therefore, beyond the reach of the legislature. The illustration is not more extreme than the contention made by the plaintiff in error. He overlooks entirely the inherent character of that against which the act is directed. He merely urges that, if abuses have grown up in the trading stamp and coupon business, the act could be directed only at the abuse and not at the business itself, if it may be so termed. The fallacy of the argument appears when we consider the inherent evil attending the trading stamp and the coupon business. Those evils have been pointed out, not only in this brief, but in the appellant's two briefs in the case of *Little vs. Tanner*, argued herewith. In addition thereto, there remains the self-evident, not-to-be-contradicted fact that the cost of the coupon and

trading stamp business becomes a charge which is ultimately paid by the consumer.

In his statement before the Ways and Means Committee, Mr. Stroock said (page 30) that the coupon and trading stamp business of the United States amounts to $100,000,000.00 a year ($125,000,000.00 is suggested here). (Page 22.) If the legislature, appreciating the conclusive fact that this enormous charge is added to the cost of the necessaries of life, and that each purchaser must pay his share of that cost whether he will or whether he will not, believed, in addition to all of the foregoing reasons why the trading stamp and coupon business should be abolished, that the prevailing high prices were unjustifiable and that measures within its power should be passed tending to relieve that condition, we respectfully submit that its conclusion was one most eminently approved by preponderant public opinion. We do not mean to say that the trading stamp and coupon business is solely responsible for the enormous increase in the cost of necessaries of life which has taken place within the last ten years, but we do mean to say that the trading stamp and coupon business has within that period of time attained its present enormous proportions; that it has contributed to that

result, and that the legislature was thoroughly justified in taking official notice of the fact, and at least one cause of it.

The legislature of the State of Washington is conclusively presumed to have used its facilities for the fullest investigation to the fullest extent (*Powell vs. Pennsylvania*, 127 U. S. 678). It was likewise fully acquainted with the local conditions then prevailing there. It is submitted that this court possesses no greater acquaintance with those conditions than with those prevailing in California (*Otis & Gassman vs. Parker*, 187 U. S. 606), or those in Pennsylvania (*Patsone vs. Penn.*, 232 U. S. 138). The state legislature being acquainted with local conditions, and it being conclusively presumed that its powers of investigation were availed of to the fullest extent, its judgment as to the necessity of the act in question is conclusive. If it does not appear from the face of the act, or from any facts of which this court must take official cognizance, that the act has no reasonable relation to an end within legislative power, the legislative determination is conclusive.

Powell vs. Pa., 127 U. S. 678, 685.

The great majority of the states have, from 1888 to the present, passed statutes against the trading

stamp and coupon business. Attention is called to the fact in detail on pages 100-134 of the appellant's brief in the case of *Tanner vs. Little*, argued and submitted herewith. The unanimity of legislative action has been noticed with very grave respect by this court in a number of cases. In *Halter vs. Nebraska*, 205 U. S. 34, 39, this court said:

> "The importance of the questions of constitutional law thus raised will be recognized when it is remembered that more than half of the states of the Union have enacted statutes substantially similar, in their general scope, to the Nebraska statute. That fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the Constitution of the United States."

If, in that case, the action of the various state legislatures was such that this court could not lightly disregard it and conclude that the legislatures had violated the Constitution of the United States, it is submitted that a more persuasive argument appears in the case at bar, because of the fact that the very great majority of the states have sought to rid themselves of the trading stamp and coupon business. While it is true the courts of the majority of the states have held these acts unconstitutional, it is respectfully submitted that

many have dealt with questions of policy, not power, and that they have failed to heed the admonition of this court in the case of *M. K. & T. Ry. Co. vs. May*, 194 U. S. 267, where the court said:

> "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Respectfully submitted,

W. V. TANNER,

Attorney General.

ALFRED H. LUNDIN,

Prosecuting Attorney for King County.

DALLAS V. HALVERSTADT.

Counsel for Defendants in Error.